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Advisory Report

Fair Work Amendment Bill 2013

House of Representatives
Standing Committee on Education and Employment

June 2013
Canberra

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Ms Nola Marino MP

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Terms of reference

On 21 March 2013, the House of Representatives Selection Committee referred the Fair Work Amendment Bill 2013 for inquiry and report.

List of abbreviations

ABI	Australian Business Industrial
ACCI	Australian Chamber of Commerce and Industry
the Act	*Fair Work Act 2009*
ACTU	Australian Council of Trade Unions
ADFVCH	Australian Domestic and Family Violence Clearinghouse
AFEI	Australian Federation of Employers and Industries
AHRC	Australian Human Rights Commission
AiG	Australian Industry Group
AMIF	Australian Motor Industry Federation
AMMA	Australian Mines & Metals Association
ANF	Australian Nursing Federation
ANF-Vic	Australian Nursing Federation (Victoria Branch)
BCA	Business Council of Australia
the Bill	Fair Work Amendment Bill 2013
CPSU	Community and Public Sector Union
DEEWR	Department of Education, Employment and Workplace Relations

ELC	Employment Law Centre of Western Australia
FIS	Financial Impact Statement
FWC	Fair Work Commission
HIA	Housing Industry Association
LCA	Law Council of Australia
MBA	Master Builders Australia
MEA	Master Electricians Australia
the Minister	Minister for Employment and Workplace Relations
NFF	National Farmers' Federation
NT	Northern Territory
NWRCC	National Workplace Relations Consultative Council
NWWC	National Working Women's Centres
the Review Panel	Fair Work Act Review Panel
RIS	Regulatory Impact Statement
SDA	Shop, Distributive and Allied Employees' Association
TCFUA	Textile, Clothing and Footwear Union of Australia
USU	United Services Union
VECCI	Victorian Employers' Chamber of Commerce and Industry

List of recommendations

Recommendation 1

The Committee recommends that the House of Representatives pass the Fair Work Amendment Bill 2013.

1

Overview of the Fair Work Amendment Bill 2013

Structure of the Bill

1.1 The Fair Work Amendment Bill 2013 (the Bill) proposes to amend the *Fair Work Act 2009* (the Act) in six broad areas:

- expanding the existing family friendly arrangements provided under the Act;
- amending the modern awards objective to provide a fair and relevant minimum safety net of terms and conditions;
- introducing new anti-bullying measures;
- amending right of entry provisions;
- amending the functions of the Fair Work Commission (FWC); and
- providing some minor technical amendments.

1.2 Each set of amendments is given effect in separate schedules within the Bill.

Referral and conduct of the inquiry

1.3 On 21 March 2013, the House of Representatives Selection Committee referred the Bill to this Committee for inquiry and report. The reason for the referral was:

> The bill makes changes to the Fair Work Act that will have an impact on each employee and employer in Australia. It is

> important that the Parliament be fully aware of this bill and identify any unintended consequences.[1]

1.4 The Committee received 41 submissions, and held a public hearing in Melbourne on 24 May 2013.

Context of the bill

1.5 The Explanatory Memorandum (EM) states that the proposed amendments are in response to findings made by the Fair Work Act Review Panel (the Review Panel) in its June 2012 report *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* and this Committee's report on workplace bullying called *Workplace bullying: We just want it to stop*.[2]

Consultations and the recommendations of the Review Panel

1.6 Some business and industry organisations expressed concern that the proposed amendments were 'not as a result of the Review Panel's recommendations' arguing that some of the proposed amendments are Government initiated, and consequently the Bill, 'does not reflect the needs of both employees and employers'.[3]

1.7 Similarly, Australian Business Industrial (ABI) stated:

> The Bill purports to respond to recommendations of the [Review] Panel [and] the recommendations of [this] Committee which undertook a significant inquiry into workplace bullying. In reality, the Bill's schedules have little to do with either report and there is little evidence of balance in its proposed provisions. The Bill was assembled quickly with no consultation and little or no warning, and contains consequences which are possibly unintended and certainly no adverted to.[4]

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1 House of Representatives Selection Committee, *Report No. 78, Consideration of Bills,* 21 March 2013, p. 4.

2 Fair Work Amendment Bill 2013, Explanatory Memorandum, pp. 1-2; Department of Education, Employment and Workplace Relations (DEEWR), *Submission 16*, p. 3.

3 Business SA, *Submission 2*, p. 4. Other organisations making this point include: Australian Chamber of Commerce and Industry (ACCI), *Submission 12*, p. 9; Master Builders Australia (MBA), *Submission 14*, p. 6; Housing Industry Association, *Submission 19*, p. 4; Australian Federation of Employers and Industries (AFEI), *Submission 38*, p. 3.

4 Australian Business Industrial, *Submission 15*, p. 4.

1.8 The Review Panel did not recommend wholesale changes, but instead made 53 technical recommendations to further promote productivity, improve equity or correct anomalies with the Act.[5]

1.9 In late 2012, the Parliament passed the first tranche of amendments to the Act based on the Review Panel's recommendations. The Fair Work Amendment Bill 2012, specifically focussed on 'unfair dismissal provisions, the functions of the Fair Work Commission and a range of technical and clarifying amendments'.[6]

1.10 The current Bill incorporates a second tranche of amendments. The Department of Education, Employment and Workplace Relations (DEEWR) stated that:

> The Bill implements the Government's response to a further five recommendations of the Fair Work Act Review Panel, as well as other changes arising from consultation with stakeholders following the release of the Review report… The Government is continuing to discuss with stakeholders the remaining recommendations of the Review Panel.[7]

1.11 DEEWR noted the Review Panel's consultation process prior to its making recommendations:

> Through the Review process all key workplace relations stakeholders, including employers, employer organisations, employees, unions, state and territory governments, academics and others were given the opportunity to share their views on the operation of the FW Act. The process enabled the Review Panel to undertake an evidence-based assessment of the legislation to determine whether it was meeting its objectives and any areas for improvement.[8]

1.12 In addition to the Review Panel's consultations, the Minister consulted the National Workplace Relations Consultative Council (NWRCC) on the amendments at a meeting on 7 March 2013. DEEWR engaged in further consultations with the NWRCC on the Bill's amendments with NRWRCC representatives on 8 March 2013 and with state and territory officials on 1 and 8 March 2013.[9]

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5 Department of Education, Employment and Workplace Relations (DEEWR), *Submission 16*, p. 4.

6 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 1.

7 DEEWR, *Submission 16*, p. 3.

8 DEEWR, *Submission 16*, p. 5.

9 DEEWR, *Submission 16*, p. 5.

1.13 DEEWR also submitted that stakeholders were further consulted on the details contained in the Bill prior to its introduction through the Committee on Industrial Legislation (a subcommittee of NWRCC) on 14 March and 20 March 2013. DEEWR provided copies of the draft legislation to stakeholders and sought their feedback on the proposed amendments.[10] Claims relating to lack of consultation are significant and this Advisory Report will consider them in greater detail in later chapters.

Regulatory Impact Statement and Financial Impact Statement

1.14 The Bill was not accompanied by a Regulatory Impact Statement (RIS). An RIS is a document prepared by the department, agency, statutory authority or board responsible for a regulatory proposal, following consultation with affected parties.

1.15 According to the Department of Finance's Best Practice Regulation Handbook, an RIS is

> mandatory for all decisions made by the Australian Government and its agencies that are likely to have a regulatory impact on business or the not-for-profit sector, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements.[11]

1.16 The absence of an RIS compounded business and employers' concerns that the Bill was progressed without consultation and without consideration of the impact on employers. Business SA stated that:

> Industrial Relations reform needs to take a balanced approach and needs to focus on productivity and efficiency as well as employee related reforms, and the potential impact of such reform must be ascertained by way of a properly conducted RIS.[12]

1.17 The Australian Chamber of Commerce and Industry (ACCI) and Master Builders Australia also expressed concerns about the absence of an RIS.[13]

1.18 DEEWR noted that there was an exceptional circumstance exemption provided by the Prime Minister so no analysis has been undertaken, but did not explain why the exemption was sought.[14]

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10 DEEWR, *Submission 16*, p. 5.

11 Department of Finance (Office of Best Practice Regulation), *Best Practice Regulation Handbook*, Canberra, June 2010, p. 8.

12 Business SA, *Submission 2*, p. 4.

13 ACCI, *Submission 12*, p. 9; MBA, *Submission 14*, p. 6.

1.19 In addition, no Financial Impact Statement (FIS) accompanied the Bill. An FIS 'describes both the direct and indirect financial impact for the Commonwealth of the proposed bill including any savings, expenses, revenue losses or gains, or changes in net asset position or the fiscal balance resulting from the proposal(s)'.[15]

1.20 The Explanatory Memorandum stated that 'financial impacts will be announced as part of the 2013-2014 Budget'.[16]

1.21 The regulatory and financial impacts of the bill were of concern to a diverse range of stakeholders. Many expressed apprehension that the FWC would have difficulty meeting its new responsibilities should the Bill be passed. These concerns focused on clauses relating to workplace bullying, and will be discussed in greater detail in Chapter 2.

Structure of report

1.22 This Advisory Report will be structured in the following way.

1.23 Chapter 2 will examine the Bill's expanded family friendly measures (Schedule 1) and Chapter 3 will examine the Bill's anti-bullying measures (Schedule 3).

1.24 Chapter 4 will address the Bill's amendments to the modern awards objective and to the right of entry provisions (Schedules 2 and 4).

1.25 Appendix B lists all submissions to the inquiry and Appendix C lists those appearing at the public hearing held in Melbourne on 24 May 2013.

14 John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, pp. 25-6.

15 Department of Prime Minister and Cabinet, *Legislation Handbook*, Canberra, 2000, 40.

16 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 13.

2

Schedule 1 – Family-friendly measures

2.1 Schedule 1 of the Fair Work Amendment Bill 2013 (the Bill) introduces five new family friendly arrangements into the *Fair Work Act 2009* (the Act) including:

- clarifying that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave (Part 1);
- providing further flexibility for concurrent unpaid parental leave (Part 2);
- expanding access to the right to request flexible working arrangements to more groups of employees (Part 3);
- requiring employers to consult with employees about the impact of changes to regular rosters or hours of work (Part 4); and
- extending the right of pregnant women to transfer to a safe job (Part 5).[1]

2.2 Some of these measures were recommended by the Fair Work Act Review Panel (the Review Panel). Others have been developed through the consultation mechanisms outlined in Chapter 1.

2.3 However, the Business Council of Australia (BCA) stated that there was a significant lack of consultation with stakeholders on many of the provisions in Schedule 1 (family-friendly measures). BCA submitted:

> Significant aspects of this part of the Bill have not been put through any consultation process and tested. In fact, only two of the measures were raised in the context of the Fair Work Act Review panel recommendations. As a result there are substantial concerns about aspects of what is being proposed.[2]

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1 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 1.

2 BCA, *Submission 34*, p. 7.

2.4 Similar comments were made by ABI, which stated that:

> Because of lack of due process, ABI's preferred position is that the schedule is not enacted. Had due process, impact evaluation and proper consultation been followed, Schedule 1 would not be in the form it is.[3]

2.5 Each part of Schedule 1 is examined below.

Special maternity leave (Part 1)

2.6 Part 1 proposes to amend the unpaid special maternity leave provisions of the Act so that any period of unpaid special maternity leave taken by an eligible employee will not reduce that employee's entitlement to unpaid parental leave under s 70 of the Act.[4] The Part gives effect to the Review Panel's recommendation 4.

2.7 Unpaid special maternity leave assists employees' management of complications or unforeseen pregnancy related issues that preclude them from continuing employment.

2.8 The Act currently provides for an entitlement to unpaid special maternity leave for an eligible employee who is not fit for work while she is pregnant, including because she has a pregnancy-related illness (s 80). Section 80(7) provides that any period of special maternity leave taken under s 80, reduces the employee's entitlement to 12 months of unpaid parental leave.[5]

2.9 The Bill repeals s 80(7) of the Act.[6] The effect of this is that the taking of unpaid special maternity leave will not reduce an employee's entitlement to unpaid parental leave.[7]

Stakeholder feedback

2.10 The special maternity leave provisions in Part 1, Schedule 1 of the Bill were supported by employee organisations and some legal advisory services.[8] However, business, industry and employer organisations expressed varying levels of concern about the amendments.[9]

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3 ABI, *Submission 15*, p. 9.

4 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 15.

5 *Fair Work Act 2009*, s 80(7).

6 Item 9, Fair Work Amendment Bill 2013.

7 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 15.

8 Australian Council of Trade Unions (ACTU), *Submission 9*, p. 3; United Services Union (USU), *Submission 26*, p. 2; Australian Nursing Federation (ANF), *Submission 22*, p. 2; Shop,

2.11 The Australian Industry Group (AiG) submitted that 'this provision would appear to have few adverse impacts upon employers'.[10] In contrast, the Australian Chamber of Commerce and Industry (ACCI) rejected the proposal,[11] commenting that 'the costs to changing existing rules around unpaid parental leave have not been quantified and it is unclear what exact impact this may have on employers'.[12] Business SA commented that any additional leave should be capped to ensure that an employee is not able to be absent from the workplace for more than two years.[13]

2.12 Master Builders Australia (MBA) submitted that though it supports unpaid special maternity leave being granted on compassionate grounds, it does not believe that a legislative enactment is required, commenting that the matter should be 'dealt with between employers and employees at the enterprise level'.[14]

2.13 DEEWR stated that:

> some organisations have claimed that the bill has introduced new entitlements to special maternity leave … This is incorrect. The concept… of special maternity leave … [has] been included in federal workplace relations since 1996 and [has] had general application to all employees covered by the federal workplace relations system since 2005.[15]

Parental leave (Part 2)

2.14 Part 2 amends parental leave provisions of the Act with the aim of providing parents with greater flexibility when caring for children.[16] This proposal was not canvassed by the Review Panel.

Distributive and Allied Employees' Association (SDA), *Submission 37*, p. 6; Employment Law Centre of Western Australia (ELC), *Submission 40*, p. 1.

9 Australian Chamber of Commerce and Industry (ACCI), *Submission 12*, p. 10; Business SA, *Submission 2*, p. 5; Master Builders Association (MBA), *Submission 14*, p. 7; Australian Business Industrial (ABI), *Submission 15*, p. 9; National Famers' Federation (NFF), *Submission 3*, p. 8; Australian Motor Industry Federation (AMIF), *Submission 30*, p. 3; Business Council of Australia (BCA), *Submission 34*, p. 7; Australian Federation of Employers and Industries (AFEI), *Submission 38*, pp. 4-5.

10 Australian Industry Group (AiG), *Submission 32*, p. 4.

11 ACCI, *Submission 12*, p. 10.

12 ACCI, *Submission 12*, 16.

13 Business SA, *Submission 2*, p. 5.

14 MBA, *Submission 14*, p. 7.

15 Mr John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 24.

16 Items 12-15, Part 1, Schedule 1, Fair Work Amendment Bill 2013.

2.15 Currently, the Act regulates the taking of unpaid parental leave by both parents where they are employed by the same employer (an employee couple). The Act provides that members of an employee couple must each take unpaid parental leave consecutively (not concurrently) and in a single unbroken period, subject to limited exceptions.[17]

2.16 These exceptions include permitting the employee couple to take leave concurrently for a period of three weeks from the date of the child's birth or adoption.[18] By agreement with the employer, the three weeks concurrent leave may be taken earlier than the birth and up to six weeks from the date of the child's birth or adoption.[19]

2.17 The Bill amends these provisions by increasing the maximum period of concurrent leave available under the unpaid parental leave provisions from three to eight weeks. The amendments also enable the eight weeks leave to be taken in separate periods (of at least 2 weeks or a shorter period if agreed by the employer) at any time within the first 12 months of the birth or adoption of a child.[20]

2.18 The Bill also amends the applicable notice period required of employees to notify their employers of the taking of unpaid parental leave. Currently the Act requires the employee to give at least ten weeks' written notice or if not practicable, the employee can provide the notice as soon as is practicable.[21] The employee is then to confirm the intended start and end dates of the leave at least four weeks before the intended start date.[22]

2.19 The Bill proposes to repeal these sections and substitutes a new subsection. The new subsection would provide that an employee must give ten weeks' written notice of the taking of unpaid parental leave, except where a member of an employee couple intends to take second and subsequent periods of concurrent leave in accordance with the previous amendments (see above), in which case the notice period is at least four weeks. [23]

2.20 The requirement to confirm start and end dates would also be amended, to provide that this confirmation is not required in relation to second and subsequent periods of concurrent unpaid parental leave.[24]

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17 *Fair Work Act 2009*, s 72; Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 16.

18 *Fair Work Act 2009*, s 72(5).

19 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 16.

20 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 16.

21 *Fair Work Act 2009*, ss 71 and 72.

22 *Fair Work Act 2009*, s 74(4).

23 Fair Work Amendment Bill 2013, Explanatory Memorandum, pp. 16-17.

24 Fair Work Amendment Bill 2013, Explanatory Memorandum, pp. 16-17.

Stakeholder feedback

2.21 The parental leave provisions in Part 2 were supported by employee organisations and some legal advice services.[25] For example, the National Working Women's Centres (NWWCs) commented on the efficacy of the amendments:

> These changes will cater to the needs of a more diverse group of families and increase the bonding and relationships that are necessary with the birth or adoption of a child.[26]

2.22 Business and industry groups provided divergent feedback on the amendments contained in Part 2. AiG submitted that 'this provision would appear to have few adverse impacts upon employers'.[27]

2.23 However, ACCI did not support these changes on the basis of the anticipated financial impact on employers.[28] Other business and employer groups expressed similar concerns.[29]

Right to request flexible working arrangements (Part 3)

2.24 Currently, the Act provides that employees may request flexible working arrangements to assist with caring responsibilities where the employee is a parent or has responsibility for the care of a child, if the child is under school age or the child is under the age of 18 and has a disability.[30]

2.25 These proposed amendments contained in Part 3 give effect to, and build upon the recommendations of the Review Panel (recommendation 5).

2.26 The Review Panel noted that though employers are taking the right to request 'seriously', the narrow scope of the Act's current provisions contributed to the low level of formal requests being made.[31]

2.27 Part 3 proposes to extend the right to request a change in working arrangements to a wider range employees who have caring responsibilities and other circumstances including where the employee:

25 ACTU, *Submission 9*, p. 4; National Working Women's Centres, (NWWCs), *Submission 8*, p. 3; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; SDA, *Submission 37*, p. 8; ELC, *Submission 40*, p. 2.

26 NWWCs, *Submission 8*, p. 3.

27 AiG, *Submission 32*, p. 4.

28 ACCI, *Submission 12*, p. 10.

29 Business SA, *Submission 2*, p. 5; ABI, *Submission 15*, p. 10; NFF, *Submission 3*, p. 10; Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submission 17*, p. 3; AMIF, *Submission 30*, p. 5; BCA, *Submission 34*, p. 7; AFEI, *Submission 38*, pp. 4-5.

30 *Fair Work Act 2009*, s 65(1).

31 Quoted in DEEWR, *Submission 16*, p. 6.

- is the parent or has responsibility for the care, of a child who is of school age or younger;
- is a carer (within the meaning of the *Carer Recognition Act 2010*) encompassing all people who provide personal care, support and assistance to individuals who need support due to disability, a medical condition, mental illness or fragility due to age;
- is 55 years or older;
- is experiencing violence from a member of the employee's family; or
- provides care or support to a member of his or her immediate family or a member of his or her household who requires care or support because the member is experiencing violence from the member's family.[32]

2.28 These proposed amendments were recommended by the Review Panel.

2.29 Part 3 also provides that an employee who is a parent, or has responsibility for the care of a child, and who is returning to work after taking leave in connection with the birth or adoption of the child, is entitled to request to work on a part-time basis, to assist the employee to care for the child.[33]

2.30 The Explanatory Memorandum states:

> The terms of the [amendment] make clear that the reason the employee would like to change their working arrangement is because of the particular circumstances of the employee. That is, there must be a nexus between the request and the employee's particular circumstances.[34]

2.31 The amendment also provides a non-exhaustive list of what might constitute 'reasonable business grounds' for the purposes of refusing an employee's request for flexible working arrangements by their employer.[35] These include:

- the excessive cost of accommodating the request;
- that there is no capacity to reorganise work arrangements of other employees to accommodate the request;
- the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff;
- that there would be a significant loss of efficiency or productivity; or

32 Item 17, Fair Work Amendment Bill 2013 (proposed new subsection 65(1A)).

33 Item 17, Fair Work Amendment Bill 2013 (proposed new subsection 65(1B)).

34 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 17.

35 Item 18, Fair Work Amendment Bill 2013 (proposed new subsection 65(5A)).

- that there would be a significant negative impact on customer service.[36]

2.32 The EM states that the amendments do not limit the 'timing or nature of discussions' about flexible working arrangements, rather the provisions are drafted with the 'intent of [promoting] discussion between employers and employees about flexible working arrangements'.[37]

Stakeholder feedback

2.33 Extending the right to request flexible working arrangements provisions' was strongly supported by employee organisations, legal practitioners, domestic violence support services, carer organisations and the Australian Human Rights Commission.[38]

2.34 The following passage from the Australian Council of Trade Unions (ACTU) typified the sentiments expressed by organisations that supported the proposed amendment:

> Extending the right to these groups acknowledges the positive benefits workforce participation brings to these groups of workers as well as the significant benefits to the labour market and the national economy.[39]

2.35 However, business and industry organisations expressed some reservation at these proposals, and many did not support their inclusion in the Act.[40] ACCI rejected the proposed amendments to the current rights of employees to request flexible working arrangements, on the grounds that the costs to employers has not been quantified.[41]

2.36 AiG questioned the necessity of the provisions, commenting that in practice, many workers request and are granted flexible working arrangements without using the right to request provisions currently in the Act.[42] Similarly, MBA also opposed the proposed measures stating that

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36 Item 18, Fair Work Amendment Bill 2013 (proposed new subsection 65(5A)).

37 Fair Work Amendment Bill 2013, Explanatory Memorandum, pp. 17-18.

38 ACTU, *Submission 9*, p. 5; CPSU, *Submission 4*, p. 4; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; SDA, *Submission 37*, p. 9; Textile, Clothing and Footwear Union of Australia (TCFUA), *Submission 39*, p. 5; Law Society of NSW, *Submission 6*, p. 5; NWWCs, *Submission 8*, p. 3; Australian Domestic and Family Violence Clearing House (ADFVCH), *Submission 20*, p. 1; Carers Victoria, *Submission 10*, p. 4; Australian Human Rights Commission (AHRC), *Submission 27*, p. 3; ELC, *Submission 40*, p. 2.

39 ACTU, *Submission 12*, p. 6.

40 ABI, *Submission 15,* p. 11; NFF, *Submission 3*, p. 13; HIA, *Submission 19*, p. 5; South Australian Wine Industry Association, *Submission 21*, p. 3; VECCI, *Submission 17*, p. 4; AMMA, *Submission 23*, pp. 24-25; AMIF, *Submission 30*, p. 7; BCA, *Submission 34*, p. 1; AiG, *Submission 32*, p. 5; AFEI, *Submission 38*, pp. 7-12.

41 ACCI, *Submission 12*, p. 10, 17.

42 AiG, *Submission 32*, p. 5.

workplaces offering flexible arrangements should be on a voluntary basis.[43]

2.37 Stakeholder feedback (both in support and in opposition to the Part 3) provided detailed discussion on the extension of the right to request flexible working arrangements. Broadly, this feedback can be categorised under the following headings:

- recommendations to include a requirement that employers give 'reasonable' or 'genuine' consideration of a request for flexible working arrangements;
- recommendations that an enforceable right to request be established with the FWC hearing employees' complaints of adverse or unreasonable refusals by employers;
- discussions about the 12-months of service eligibility requirement; and
- evidentiary concerns.

'Reasonable' or 'genuine' consideration to requests

2.38 The ACTU, Community and Public Sector Union (CPSU), United Services Union, Australian Nursing Federation and Carers Victoria recommended that the Bill be amended to also require that employers give 'reasonable' or 'genuine' consideration to a request by an employee for flexible working arrangements.[44]

2.39 For example, the CPSU recommended to that the Bill be amended to:

> place obligations upon an employer to give genuine or serious consideration to the request [for flexible working arrangements] and also make reasonable efforts to accommodate that request.[45]

2.40 The CPSU commented that such an amendment would give the Bill additional clarity whilst also giving employees confidence that their request would be appropriately considered.[46]

Creating an enforceable right to request in the FWC

2.41 Many organisations supportive of Part 3 recommended that the Bill create an enforceable right to request flexible working arrangements. Under such

43 MBA, *Submission 14*, p. 8.

44 ACTU, *Submission 12*, p. 7-11; CPSU, *Submission 4*, p. 4; USU, *Submission 26*, p. 4; ANF, *Submission 22*, p. 3; SDA, *Submission 37*, p. 4. Tim Lyons, Assistant Secretary, ACTU, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 5.

45 CPSU, *Submission 4*, p. 4.

46 CPSU, *Submission 4*, p. 4.

a proposal, if a request was refused an employee or their industrial representatives could apply to the FWC for resolution.[47]

2.42 The Australian Human Rights Commission, advocated that the Bill establish a procedural appeals process through the FWC for decisions related to the right to request flexible working arrangements.[48]

2.43 Carers Victoria also expressed concern that neither the Act, nor the present Bill, allow an employee to appeal to the FWC in the event of an unreasonable adverse decision.[49]

2.44 NWWC was of the view that the provisions would leave workers with 'rights on paper only'. NWWC observed that an employee currently has no mechanism for appeal unless an agreement for flexible working hours is specifically included in an enterprise agreement.[50] Consequently, NWWC recommended that the FWC be granted powers to deal with disputes and make orders where appropriate in relation to requests for flexible working arrangements.[51]

2.45 The Department of Education, Employment and Workplace Relations, (DEEWR) responded to some of these concerns when this issue was first raised in the Review Panel's inquiry of 2012. The Review Panel found that as employers are giving serious consideration to requests for flexible working arrangements and reaching agreements with their employees about these requests, a formal appeal mechanism was not warranted.[52]

Removing the 12 months of service requirement

2.46 ACTU, Carers Victoria and the Australian Domestic and Family Violence Clearinghouse recommended the removal of the eligibility requirement of 12 months prior service.[53]

Evidentiary concerns

2.47 The issue of employees providing evidence of their grounds to request flexible working arrangements was the subject of comment from organisations that both supported and opposed the Bill.

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47 CPSU, *Submission 4*, p. 4; ACTU, *Submission 12*, p. 7-11; USU, *Submission 26*, p. 4; ANF, *Submission 22*, p. 3; AHRC, *Submission 27*, pp. 3-4; Carers Victoria, *Submission 10*, p. 11; ADFVCH, *Submission 20*, p. 2; SDA, *Submission 37*, p. 4; TCFUA, *Submission 39*, p. 5.

48 AHRC, *Submission 27*, pp. 3-4.

49 Carers Victoria, *Submission 10*, p. 11.

50 NWWCs, *Submission 8*, p. 4.

51 NWWCs, *Submission 8*, p. 4.

52 DEEWR, *Submission 16*, p. 10.

53 ACTU, *Submission 9*, p. 5; Carers Victoria, *Submission 10*, p. 8; ADFVCH, *Submission 20*, p. 3

2.48 Though Carers Victoria supported the family-friendly measures, it expressed concerns regarding the proof of an employee's carer status, as some employees may feel inhibited in 'disclosing information about their family member's condition or level of disability because they wish to protect their privacy and dignity'.[54]

2.49 Consequently, Carers Victoria recommended the development of guidelines to assist employers and employees, and noted the Victorian Equal Opportunity and Human Rights Commission's *Family Responsibilities – Guidelines for Employers and Employees* as a model example.[55]

2.50 The NFF stated:

> extending the right to request flexible working arrangements to (amongst others) employees with disabilities, who have caring responsibilities, who are over 55 years of age or older, or who are experiencing domestic violence from a family member could be easily exploited.[56]

2.51 Godfrey Hirst Australia expressed similar concerns regarding employees subject to family violence and recommended that an employee be required to provide

> some form of proof, such as a document issued by the police, a court, a medical practitioner or counselling professional, or a domestic violence support service, with any such information provided be subject to the *Privacy Act 1988*.[57]

2.52 Similar comments were made by MEA that stated that there should be a legislated requirement to produce evidence to the satisfaction of the employer.[58]

Consultation on changes to rosters or working hours (Part 4)

2.53 Part 4 proposes to insert new content requirements for modern awards and enterprise agreements that would require employers to 'genuinely consult' employees about changes to regular rosters or ordinary hours of work.

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54 Carers Victoria, *Submission 10*, p. 8.

55 Carers Victoria, *Submission 10*, p. 8.

56 NFF, *Submission 3*, p. 13.

57 Godfrey Hirst Australia, *Submission 13*, p. 7.

58 MEA, *Submission 11*, p. 10.

2.54 The amendments would require the employer to inform employees about a proposed change to their regular roster or ordinary hours of work and invite employees to give their views on the impact of the proposed change (particularly family and caring responsibilities). The employer would be required to consider those views.[59] These measures were not canvassed by the Review Panel's report.

2.55 The Explanatory Memorandum states that it is intended that the requirement to consult will:

> not be triggered by a proposed change where an employee has irregular, sporadic, or unpredictable working hours. Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award.[60]

2.56 DEEWR confirmed that:

> The rostering protections will instead apply to all employees with regular and systematic working hours, whether they are employed on a permanent or causal basis. … the requirement to consult on a change to working hours is not intended to apply to employees with irregular, sporadic or unpredictable hours of work.[61]

2.57 As the amendments would ensure that employers cannot make unilateral changes that 'adversely impact upon their employees' without consultation:

> the intention of the amendments is to promote discussion between employers and employees who are covered by a modern award or who are party to an enterprise agreement about the likely impact of a change to an employee's regular roster or ordinary house of work, particularly in relation to the employee's family and caring arrangements.[62]

2.58 The Explanatory Memorandum clarifies that employers and employees will still be able to negotiate a consultation term for inclusion in an enterprise agreement that meets the requirements of their specific workplace. However, the agreement must include a consultation term in

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59 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 20. See Item 21, Fair Work Amendment Bill 2013 (proposed new subsection 205(1A)).

60 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 20.

61 DEEWR, *Submission 16*, p. 14.

62 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 19.

accordance with this amendment. If the enterprise agreement does not provide a consultation term, the model consultation term (as set by this Bill) will be taken to be a term of the agreement.[63]

2.59 The amendments will apply to modern awards in operation on or after 1 January 2014. The Bill provides that the FWC must make a determination varying modern awards to include a consultation term which meets the new requirements set out in the Bill, by 31 December 2013. The FWC will be able to vary existing consultation terms to reflect the new requirements.[64]

Stakeholder feedback

2.60 Part 4 was supported by employee organisations and some legal advice services.[65] However, ACTU recommended that Part 4 be amended to require employers to give 'genuine' consideration to any views expressed by employees when engaging in consultation about changes to rosters or working hours.[66]

2.61 ACTU also recommended that the Bill require employers to 'make reasonable efforts to accommodate the needs of the employee' when making changes to rosters or working hours.[67]

2.62 Business and industry groups rejected amendments proposed in Part 4.[68] ACCI strongly disagreed with the measures stating:

> There is no evidence that the provisions are warranted. These proposals have not been the subject of an open consultative process… They impose onerous new statutory obligations to consult employees and allow union representation. They are not "light touch" regulation as any single breach of a modern award may subject an employer to a [financial] penalty [between] $10,200 [and] $51,000.[69]

63 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 22.

64 DEEWR, *Submission 16*, p. 14.

65 ACTU, *Submission 9*, p. 12; NWWCs, *Submission 8*, p. 3; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; SDA, *Submission 37*, p. 12; ELC, *Submission 40*, p. 3.

66 ACTU, *Submission 9*, p. 13.

67 ACTU, *Submission 9*, p. 13.

68 Business SA, *Submission 2*, p. 11; NFF, *Submission 3*, p. 15; MEA, *Submission 11*, p. 11; ACCI, *Submission 12*, p. 17; MBA, *Submission 14*, pp. 10-12; ABI, *Submission 15*, p. 14; VECCI, *Submission 17*, p. 4; HIA, *Submission 19*, p. 7; South Australian Wine Industry Association, *Submission 21*, p. 4; AMMA, *Submission 23*, p. 25; AMIF, *Submission 30*, p. 8; AiG, *Submission 32*, p. 6; BCA, *Submission 34*, p. 6.

69 ACCI, *Submission 12*, p. 17.

2.63 The Business Council of Australia (BCA) stated:

> The amendments leaves the way open to increased third-party intervention in the management of businesses, and could (depending on the content of dispute settling clauses) result in the imposition of arbitrated outcomes in relation to what ought properly to be seen as matters for management.[70]

2.64 NFF commented that the provision is 'overly restrictive especially in relation to an agriculture workplace where the workflow is unpredictable at most times, depending on the weather and market'.[71]

2.65 DEEWR clarified these concerns:

> In respect of rostering protections, there have been claims that the consultations requirement for changes to rosters will apply to any change of hours. This is not the case. The new requirements would only apply to proposed changes to a regular roster or ordinary hours of work. Furthermore, the requirements will not arise where an employee has irregular, sporadic or unpredictable working hours.[72]

Safe job transfer during pregnancy (Part 5)

2.66 Part 5 provides a pregnant employee with an entitlement to be transferred to a safe job regardless of whether she has, or will have, an entitlement to unpaid parental leave.[73] These proposed measures were not canvassed by the Review Panel.

2.67 Under the amendments, an employee would be required to provide evidence (such as an medical certificate) of the kind that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her present position during the risk period because of illness or risks arising out of her pregnancy or hazards connected with the position.[74]

2.68 The Bill also proposes a new entitlement that where evidentiary requirements are met, for the duration of the risk period, the employee

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70 BCA, *Submission 34*, p. 6.

71 NFF, *Submission 3*, p. 15.

72 John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 24.

73 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 22.

74 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(6)); Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 23.

must be transferred to an appropriate safe job with no other change to the employee's terms and conditions of employment.[75]

2.69 The definition of an 'appropriate safe job' is retained. An 'appropriate safe job' is a 'safe job that has the same ordinary hours of work as the employee's present position, or an agreed different number of hours'.[76] The current requirement that an employer pay the transferred employee at her full rate of pay for the original position prior to the transfer, for the hours that she works in the risk period is also retained.[77]

2.70 If there is no appropriate safe job available, the Bill provides that:

- where an employee is otherwise entitled to unpaid parental leave, the employee will be entitled to paid no safe job leave at their base rate of pay, as currently exists under the Act;[78] and
- where an employee is not entitled to unpaid parental leave, the employee is entitled to unpaid no safe job leave.[79]

Stakeholder feedback

2.71 The provisions establishing a right for pregnant employees to request a transfer to a safer job during their pregnancy was supported by all employee organisations and legal practitioners.[80]

2.72 Though supporting the proposed amendment, the Law Society of New South Wales was concerned that there is 'uncertainty' in the existing provisions relating to safe-job transfers.[81] The Society submitted that the Bill provide clarification on the following:

- whether written notice needs to be provided to the employer by the employee in order to enliven the access to transfer to a safe job or no safe job leave;
- whether there should be a requirement for the employee to define what specifically they are advised would be safe, and not safe, to assist the employer in determining whether there is an appropriately safe job in the workplace; and

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75 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(2)).

76 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(3)).

77 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(4)).

78 Item 29, Fair Work Amendment Bill 2013 (proposed new section 81A); Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 24.

79 Item 30, Fair Work Amendment Bill 2013 (proposed new section 82A).

80 For example, ACTU, *Submission 9*, p. 13; NWWCs, *Submission 8*, p. 3; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; Law Society of NSW, *Submission 6*, p. 6; SDA, *Submission 37*, p. 14; ELC, *Submission 40*, p. 3.

81 Law Society of NSW, *Submission 6*, p. 6.

- the effect on the employee's entitlements if the appropriate safe job was a 'higher duty' rather than the assumed lesser role.[82]

2.73 NFF highlighted similar concerns.[83]

2.74 Other business and employer organisations rejected the proposed amendment on the grounds that they were unnecessary.[84] For example, ACCI stated:

> There is no evidence that these provisions are warranted and that employers and employees are not able to come to suitable arrangements when an employee requests a safe job despite not having a statutory right to unpaid parental leave.[85]

2.75 Australian Business Industrial (ABI) commented that employers are already obligated under work health and safety laws to ensure safe working conditions for all employees. ABI stated:

> These amendments are not about health or safety. They do not go to the safety of the woman or her unborn child, they address industrial entitlements. The employer's responsibilities under [existing] health and safety legislation mean that they must avoid exposing the pregnant employee to work which presents risks to her or her unborn baby.[86]

2.76 MBA argued that the new entitlements should be costed and 'other mechanisms for social support of pregnant women considered, having regard to the cost on businesses…. Hence, deferral of the Bill until this process has been completed is recommended'.[87]

Committee comment

2.77 Clearly there is a balance of views on the provisions contained within Schedule 1 of the Bill. The Committee recognises the concerns of some employers but is of the opinion that there are adequate safeguards in place to ensure that there is a balance between the needs of employers and employees in respect to the proposed schedule.

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82 Law Society of NSW, *Submission 6*, p. 6.

83 NFF, *Submission 3*, pp. 15-16.

84 AiG, *Submission 32*, p. 8; Business SA, *Submission 2*, p. 5; ACCI, *Submission 12*, p. 18; MBA, *Submission 14*, p. 12; ABI, *Submission 15*, p. 15; MEA, *Submission 11*, p. 12; VECCI, *Submission 17*, p. 5; AFEI, *Submission 38*, pp. 4-5.

85 ACCI, *Submission 12*, p. 18.

86 ABI, *Submission 15*, p. 15.

87 MBA, *Submission 14*, p. 12.

3

Schedule 3 – Anti-bullying measure

3.1 Schedule 3 of the Fair Work Amendment Bill 2013 (the Bill) amends the *Fair Work Act 2009* (the Act) to include a new Part 6-4B that implements the Government's response to this Committee's report, *Workplace Bullying: 'We just want it to stop'*, (the workplace bullying report) specifically recommendations 1 and 23.[1]

3.2 The workplace bullying inquiry heard extensive evidence that existing criminal offences for breaches of work health and safety (WHS) laws, (matters that for most employees constitutionally remain with state governments) can be deficient in responding to instances of workplace bullying.[2]

3.3 Further, WHS laws do not provide an individual worker with a right of recourse. Rather commencement of action under these laws is exclusively engaged by state or territory regulators. The ability for an individual worker to concurrently pursue recourse swiftly and inexpensively through workplace relations law was a key recommendation of the workplace bullying report.[3]

3.4 The Bill proposes to allow a worker who has been bullied at work, to apply to the Fair Work Commission (FWC) for an order to stop the bullying.[4] This individual right to recourse will exist concurrently with

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1 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: 'We just want it to stop'*, October 2012, Canberra. Fair Work Amendment Bill 2013, Explanatory Memorandum, 27.

2 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: 'We just want it to stop'*, October 2012, Canberra, pp. 64-65.

3 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: 'We just want it to stop'*, October 2012, Canberra, Recommendation 23.

4 Item 6, Schedule 3, Fair Work Amendment Bill 2013 (proposed new section 789FF).

actions to be brought under WHS laws of each state and territory.[5] The FWC may also refer matters to the appropriate WHS regulator.

3.5 Under the amendments, the FWC would be enabled to make any order it considers appropriate (other than a pecuniary fine) to stop the bullying.[6] The Explanatory Memorandum (EM) provides:

> Orders will not necessarily be limited or apply only to the employer of the worker who is bullied, but could also apply to others, such as co-workers and visitors to the workplace.[7]

3.6 The EM states that 'the focus is on resolving the matter and enabling normal working relationships to resume'.[8] The types of orders that the FWC may make include orders that require:

- the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer's workplace bullying policy;
- the provision of information and additional support and training to workers; or
- a review of the employer's workplace bullying policy.[9]

3.7 A broad range of workers would be eligible to apply to the FWC under the Bill. This includes any individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience, or a volunteer.[10] This mirrors the broad definition of 'worker' as established in the *Work Health and Safety Act 2011*, and not the traditional 'employee' definition used in industrial relations laws.[11]

3.8 The Bill would require the FWC to commence processing an application for an order to stop bullying within 14 days of the application being made,[12] which reflects individuals who have experienced workplace bullying expressed desire for a swift resolution process.[13]

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5 Item 6, Schedule 3, Fair Work Amendment Bill 2013 (proposed new section 789FH).

6 Item 6, Schedule 3, Fair Work Amendment Bill 2013 (proposed new section 789FF).

7 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 30.

8 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 30.

9 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 30.

10 Item 6, Schedule 3, Fair Work Amendment Bill 2013 (proposed new section 789FC).

11 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 29.

12 Item 6, Schedule 3, Fair Work Amendment Bill 2013 (proposed new section 789FE).

13 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: 'We just want it to stop'*, October 2012, Canberra, pp. 185-186.

3.9 According to the Explanatory Memorandum, 'commencement' may include the FWC 'taking steps to inform itself of the matters…, conducting a conference…, or deciding to hold a hearing'.[14]

3.10 When deciding if a worker has been bullied, it is proposed that the FWC will use the definition developed by Safe Work Australia,[15] adopted in the national model Code of Practice, and supported by this Committee:[16]

> A worker is bullied at work if an individual or group of individuals, repeatedly behaves unreasonably towards the worker, or a group of workers, and that behaviour creates a risk to health and safety.[17]

3.11 In considering the terms of an order to prevent the worker from being bullied at work, the FWC must consider:

- any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body;
- the procedures, if any, available to the worker to resolve grievances or disputes within the workplace;
- any final or interim outcomes arising out of any procedure available to the worker to resolve the dispute at the workplace level; and
- any other matters the FWC considers relevant.[18]

3.12 Importantly, this proposed new section would permit the FWC to 'frame the order in a way that has regard to compliance action being taken by the employer or a health and safety regulator or another body, and to ensure consistency with those actions'.[19]

3.13 An application for an order may be made by person affected by the contravention, an inspector or an industrial association. An application may be made to the Federal Court, the Federal Magistrates Court or an eligible State or Territory court.[20]

3.14 The Department of Education, Employment and Workplace Relations (DEEWR) submitted that a breach of an order made by the FWC will engage a civil remedy provision attracting a maximum penalty of $10,200

14 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 30.

15 Safe Work Australia, *Submission 74 to the inquiry into Workplace Bullying of the House of Representatives Standing Committee on Education and Employment*, p. 10.

16 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: 'We just want it to stop'*, October 2012, Canberra, Recommendation 1, p. 18.

17 Item 6, Schedule 3, Fair Work Amendment Bill 2013 (proposed new section 789FD).

18 Item 6, Schedule 3, Fair Work Amendment Bill 2013 (proposed new subsection 789FF(2)).

19 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 31.

20 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 28.

for individuals or $51,000 for a corporate entity.[21] According to DEEWR, these penalties align with existing provisions for similar breaches of FWC orders.[22]

Stakeholder feedback

3.15 The anti-bullying measures contained in Schedule 3 were strongly supported by employee representative organisations and some legal practitioners.[23]

3.16 The Australian Council of Trade Unions (ACTU) supported the Bill's definition of workplace bullying, as well as the nature of FWC proceedings and the discretion and flexibility of the orders which FWC may grant following an application.[24]

3.17 The Community and Public Sector Union (CPSU) expressed hope that the individual-employee mechanism proposed in the Bill will have a corresponding effect on employers and 'encourage them to be pro-active at managing and rectifying workplace bullying complaints'.[25]

3.18 Business and employer organisations were either reserved in their support of the Bill's anti-bullying measures or expressed clear opposition.[26]

3.19 The Australian Industry Group (AiG) was opposed to the Bill's anti-bullying measures, stating the Schedule would increase existing widespread confusion as well as rates of disputation in workplaces.[27]

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21 Department of Education, Employment and Workplace Relations (DEEWR), *Submission 16*, p. 18.

22 DEEWR, *Submission 16*, p. 18.

23 Australian Council of Trade Unions (ACTU), *Submission 9*, p. 17; Community and Public Service Union (CPSU), *Submission 4*, p. 5; Australian Nursing Federation (Victoria Branch) (ANF-Vic), *Submission 5*, p. 4; National Working Women's Centres (NWWCs), *Submission 8*, p. 3; United Services Union (USU), *Submission 26*, p. 3; Australian Nursing Federation (ANF), *Submission 22*, p. 2; ; Shop, Distributive and Allied Employees' Association (SDA), *Submission 37*, p. 17; Textile, Clothing and Footwear Union of Australia (TCFUA), *Submission 39*, p. 6; Launceston Community Legal Centre, *Submission 31*, pp. 1-2; Law Society of New South Wales, *Submission 6*, p. 7; Beasley Legal, *Submission 36*, p. 1; Employment Law Centre of Western Australia, *Submission 40*, p. 4.

24 ACTU, *Submission 9*, pp. 19, 20.

25 CPSU, *Submission 4*, p. 5.

26 Business SA, *Submission 2*, p. 4; Business Council of Australia (BCA), *Submission 34*, p. 7; Australian Industry Group (AiG), *Submission 32*, p. 10; Australian Chamber of Commerce and Industry (ACCI), *Submission 12*, p. 22; Housing Industry Association (HIA), *Submission 19*), p. 10; Master Builders Australia (MBA), *Submission 14*, p. 14; Australian Business Industrial (ABI), *Submission 15*, p. 19; Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submission 17*, p. 7; Australian Mines & Metals Association (AMMA), *Submission 23*, p. 40; Australian Federation of Employers and Industries (AFEI), *Submission 38*, p. 17.

3.20 Though supporting the majority of recommendations in the workplace bullying report, the Australian Chamber of Commerce and Industry (ACCI) opposed the proposal to create a new jurisdiction within the FWC.[28] ACCI was also concerned that the orders which the FWC could issue are too broad, specifically with reference to the proposed new sections that would allow the FWC's orders to apply to third parties such as visitors and members of the public.[29]

3.21 The Queensland Law Society commented:

> It is contrary to the principles of procedural fairness and natural justice to empower the FWC to make orders that would affect a person or entity that is not a party to the application. [The Society] recommend that [this proposed section] be amended so that the FWC is only empowered to make orders binding the parties to the application.[30]

3.22 Broadly, stakeholder feedback can be categorised under the following headings:

- opposition to the Bill on the basis that workplace bullying should remain within the WHS space only;
- questions regarding the constitutionality of the measures;
- concerns regarding projected costs to business, particularly small business;
- arguments for a requirement that internal procedures of the workplace be exhausted prior to applying to the FWC;
- recommendations that improve the Bill's clarity;
- state and territory public service concerns;
- concerns that the FWC be properly funded and resourced to meet its additional responsibilities; and
- concerns about a perceived lack of consultation in the development of the measures.

3.23 Each of these is addressed below.

27 AiG, *Submission 32*, p. 10.

28 ACCI, *Submission 12*, p. 22.

29 ACCI, *Submission 12*, p. 23.

30 Queensland Law Society, *Submission 33*, p. 2.

Jurisdictional character of anti-bullying laws

3.24 Business and employer organisations, opposing the Bill's anti-bullying measures, advocated that workplace bullying should remain exclusively within the WHS jurisdictions.[31]

3.25 AiG stated that though bullying is an issue that employers take very seriously, it 'is not an industrial relations issue [rather] it is primarily a work health and safety issue'.[32] As behaviour assessed as a risk to WHS, the National Farmers' Federation (NFF), Master Electricians Australia (MEA), Housing Industry Association, Australian Mines & Metals Association (AMMA), and Australian Motor Industry Foundation all argued that workplace bullying should remain exclusively within the WHS jurisdiction.[33]

3.26 Australian Business Industrial (ABI) observed that individuals could pursue complaints both in the FWC and through the WHS regulators' mechanisms.[34] The NFF commented that concurrent jurisdictions will 'encourage forum shopping'.[35]

3.27 The Northern Territory Government (NT Government) further commented:

> Whilst it is important to provide this opportunities for remedies for those workers who are bullied at work; it is equally important that once a matter is heard in one jurisdiction that the matter be considered resolved so that the parties can get on with their business.[36]

3.28 The NT Government added that concurrent jurisdiction would contribute to already high-levels of confusion in the community.[37]

3.29 The Business Council of Australia argued that the Government's focus should be on prevention rather than providing new avenues of individual recourse that are likely to make workplaces more divisive.[38]

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31 Business SA, *Submission 2*, p. 4; ACCI, *Submission 12*, pp. 22-23; AiG, *Submission 32*, p. 10; ABI, *Submission 15*, p. 19; National Farmers' Federation (NFF), *Submission 3*, p. 20; Master Electricians Australia (MEA), *Submission 11*, p. 16; HIA, *Submission 19*, p. 11; Australian Motor Industry Federation (AMIF), *Submission 30*, p. 5; BCA, *Submission 34*, p. 7.

32 AiG, *Submission 32*, p. 10.

33 NFF, *Submission 3*, p. 20; MEA, *Submission 11*, p. 16; HIA, *Submission 19*, p. 11; AMMA, *Submission 23*, p. 35; AMIF, *Submission 30*, p. 5.

34 ABI, *Submission 15*, pp. 19-24.

35 NFF, *Submission 3*, p. 20.

36 NT Government, *Submission 7*, p. 7.

37 NT Government, *Submission 7*, p. 7.

38 BCA, *Submission 34*, p. 7.

3.30 In contrast, the Law Society of New South Wales, referring to previous submissions and evidence given to this Committee in its inquiry into workplace bullying, confirmed that the FWC is an 'appropriate forum to deal with complaints about bullying'.[39]

3.31 DEEWR stated that:

> The provisions are designed to complement, not replace, existing work health and safety obligations and the work done by work health and safety regulators. A person can make an application to both the Fair Work Commission and the relevant work health and safety regulator at the same time in keeping with the different process and outcomes available in each jurisdiction. The Fair Work Commission is working closely with work health and safety regulators on protocols to inform its handling of applications.[40]

Constitutional jurisdiction

3.32 As noted above, WHS law is a matter that falls within the residual powers of state governments under the Australian Constitution. The question thus arises as to whether the Commonwealth Government can gain constitutional authority to legislate on workplace bullying which has hitherto been considered a WHS matter, simply by redefining it as an industrial relations matter.

3.33 ABI referred to evidence taken (and referenced in its report) during its workplace bullying inquiry.[41] The workplace bullying report stated:

> It is, however, unclear whether the functions of Fair Work Australia [now the FWC] could be expanded to enable them to make determinations about all cases of workplace bullying, regardless of whether they fall under the criteria of the current general protections or unfair dismissal provisions of the *Fair Work Act*. Ms Bernadette O'Neill, General Manager of Fair Work Australia commented that following the High Court's decision in regards to Work Choices it is very likely that the Commonwealth Government does have the constitutional legal capacity to deal with workplace bullying under industrial relations laws. However, she also acknowledged that it would be a monumental

39 Law Society of NSW, *Submission 6*, p. 7.

40 Mr John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence*, 24 May 2013, Melbourne, p. 24.

> change and the legal and constitutional capacity is only one of many factors that would need to be taken into account.[42]

3.34 Responding to these constitutional questions, DEEWR explained that the constitutional basis for the Commonwealth's powers in this regard are already established:

> The definition of when a worker is bullied at work is—and this is why it is drafted the way it is—'while a worker is at work in a constitutionally covered business'. That is, if you like, the constitution or the head of power under which the Commonwealth can make these laws. We are not really relying on anything other than basically the same laws that underpinned workplace relations law since the Work Choices case. Just to expand on that, if a person is employed in a constitutional corporation by the Commonwealth or a Commonwealth authority, or a body incorporated in a territory, or the business they are undertaking is conducted principally in a territory or Commonwealth place, then you will be covered under this act—so it has got pretty broad coverage. The exemptions would probably be if you are employed in a partnership or not engaged in a territory—those kinds of things. … Those who would not be covered by the definition of 'constitutionally covered business' would include state government employees and employees of unincorporated bodies such as sole traders, partnerships, not-for-profit associations, volunteer associations and companies not significantly engaged in trading or financial sorts of activities. That is a reflection of the extent of the Commonwealth's constitutional powers in this area.[43]

Projected costs to business

3.35 Another key concern of business and employer organisations was possible additional, unforeseen costs to business, particularly small business.

3.36 Business SA commented that

> small businesses would not have the resources, time or experience to be able to actively engage with [the various federal and state]

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42 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: 'We just want it to stop'*, October 2012, Canberra, p. 188.

43 Jeremy O'Sullivan, Chief Counsel, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, pp. 28-9.

> legal processes and provide a response if a complaint were allowed to be hear[d] under multiple laws.[44]

3.37 Referencing its concerns that the Bill was not accompanied by a Regulatory Impact Statement (see para 1.17.), Master Builders Australia (MBA) expressed concern that the measures will require employers to:

> establish procedures which demonstrate that reasonable management action has taken place and that it has been applied in a reasonable manner. The cost to employers of establishing these procedures in a sufficiently formal manner to stand as proof in the tribunal has not been considered and costed.[45]

Requirement that internal processes be exhausted

3.38 Some stakeholders recommended the Schedule be amended so that internal workplace processes, where they exist, are exhausted prior to applying to the FWC.[46]

3.39 For example, Mr Eric Windholz from the Centre of Regulatory Studies at Monash University, recommended that the proposed section be amended to require employees to seek to resolve the matter through internal workplace policies and processes prior to making an application to the FWC, or to state in the application why recourse via the internal processes is not appropriate.[47] Godfrey Hirst Australia, MEA and AMMA had similar recommendations for amendment.[48]

3.40 The Queensland Law Society submitted that 'there may also be utility in setting prerequisites that must be met in order for a worker to be eligible to make an application'.[49] The Society therefore recommended that a worker be required to notify their employer of the bullying complaints and give the employer a reasonable opportunity to take action to address the complaint, before an application to the FWC is made.[50]

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44 Business SA, *Submission 2*, p. 15.

45 MBA, *Submission 14*, pp. 14-15.

46 Mr Eric Windholz, Centre for Regulatory Studies, Monash University, *Submission 1*, p. 1; Godfrey Hirst Australia Pty Ltd, *Submission 13*, pp. 6-7; MEA, *Submission 11*, p. 14; AMMA, *Submission 23*, pp. 42-43; Rio Tinto, *Submission 35*, p. 9..

47 Mr Eric Windholz, Centre for Regulatory Studies, Monash University, *Submission 1*, p. 1.

48 Godfrey Hirst Australia Pty Ltd, *Submission 13*, pp. 6-7; Master Electricians Australia (MEA), *Submission 11*, p. 14; AMMA, *Submission 23*, pp. 42-43.

49 Queensland Law Society, *Submission 33*, p. 2.

50 Queensland Law Society, *Submission 33*, p. 2.

3.41 In proposing this recommendation, the Society stated:

> Such prerequisites would provide businesses with an opportunity to resolve the issue without the need for third party intervention and could also assist in the resolution of issues at an earlier stage and in turn, reduce the level of disputes in this area.[51]

Clarifying terms of the Bill

3.42 The definition of workplace bullying adopted in the Bill was endorsed by some stakeholders,[52] and this reflected the wide support in the Committee's previous inquiry. [53]

3.43 However, the Australian Nurses Federation (Victoria Branch) (ANF-Vic) proposed that the Bill could be given greater clarity if examples of the types of behaviours that might fall within the definition of workplace bullying were to be included as a note to the proposed section. [54]

3.44 The ANF-VIC also recommended that further clarity be provided about the types of orders that the FWC is able to make.[55]

3.45 Beasley Legal proposed that the Schedule be amended to provide clarity to stakeholders as to what constitutes 'reasonable management action'.

3.46 Beasley Legal further proposed that the employer carry the burden of proof to discharge that the behaviour report was 'reasonable management action' under the following definition: action that was 'commenced based on prima facie evidence; was undertaken in a reasonable manner; and was genuine and not used as an abuse of process against the employee or group of employees'.[56]

3.47 The Queensland Law Society also made recommendations to clarify terms of the Bill. Specifically, that the Schedule be amended to clarify who an application can be brought against.[57]

3.48 The Queensland Law Society also recommended that in most cases it would be appropriate to include both the alleged perpetrator of the bullying conduct as well as the employer:

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51 Queensland Law Society, *Submission 33*, p. 3.

52 ACTU, *Submission 9*, p. 19; Law Society of NSW, *Submission 6*, p. 7; Rio Tinto, *Submission 35*, p. 8.

53 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: 'We just want it to stop'*, October 2012, Canberra, pp. 14-16.

54 ANF-Vic, *Submission 5*, p. 4.

55 ANF-Vic, *Submission 5*, p. 4.

56 Beasley Legal, *Submission 36*, p. 1.

57 Queensland Law Society, *Submission 33*, p. 1.

without the participation of both of those parties it will be difficult for the FWC to have a clear understanding of the issues involved and identify ways to resolve the complaint.[58]

Funding and resourcing the Fair Work Commission

3.49 Employer and employee organisation, employers and an academic expressed concern that the FWC is not currently resourced sufficiently to meet additional responsibilities proposed in the Bill.[59]

3.50 The CPSU expressed doubt that the FWC's existing resources (both financial and human) would be able meet proposed additional responsibilities.[60]

3.51 ACCI expressed concern that members of the FWC do not currently have the skills or experience to deal with workplace bullying matters,[61] nor the resources to meet its required standard of commencing an investigation within 14 days of receipt of an application.[62]

3.52 These concerns were raised by the FWC at a Senate Estimates hearing in February 2013. The General Manager, Ms Bernadette O'Neill, commented that, should the Bill be passed and the FWC received additional responsibilities to hear bullying applications, it 'would not be in a position to absorb the costs'.[63] Ms O'Neill also indicated that there would be a need for professional development of FWC staff.[64]

3.53 In the 2013-2014 Federal Budget the FWC was allocated $21.4 million over four years to provide a legal remedy for victims of workplace bullying.[65]

3.54 The additional funds will be used by the FWC to work with relevant parties to resolve complaints of workplace bullying. Where a worker has been bullied and the matter cannot be resolved between the parties, the

58 Queensland Law Society, *Submission 33*, pp. 1-2.

59 ACCI, *Submission 12*, pp 23-24; CPSU, *Submission 4*, p. 4; NWWCs, *Submission 8*, p. 5; Mr Eric Windholz, Centre for Regulatory Studies, Monash University, *Submission 1*, p. 1; Godfrey Hirst Australia Pty Ltd, *Submission 13*, p. 6; AMMA, *Submission 23*, p. 41; ANF, *Submission 22*, p. 2; MBA, *Submission 14*, p. 17; Rio Tinto, *Submission 35*, p. 10.

60 CPSU, *Submission 4*, p. 4.

61 ACCI, *Submission 12*, p. 23

62 ACCI, *Submission 12*, pp. 23-24.

63 Ms Bernadette O'Neill, General Manager, FWC, *Senate Estimates Committee Hansard*, Senate Education, Employment and Workplace Relations Legislation Committee, Canberra, 13 February 2013, p. 26.

64 Ms O'Neill, FWC, *Senate Estimates Committee Hansard*, Senate Education, Employment and Workplace Relations Legislation Committee, Canberra, 13 February 2013, p. 26.

65 Budget Paper No.2 Budget Measures 2013-2014, Part 2: Expense Measures, Education Employment and Workplace Relations, http://www.budget.gov.au/2013-14/content/bp2/html/bp2_expense-09.htm

FWC will have the power to make an order to prevent bullying in the workplace in the future.[66]

Perceived lack of consultation

3.55 Chapter 1 referred to stakeholders' concerns regarding a perceived lack of consultation. The chapter also canvassed the consultations the Minister and DEEWR have conducted in recent months with the National Workplace Relations Consultative Council and its subcommittee, the Committee on Industrial Legislation, as well as through other mechanisms.

3.56 Despite these consultations, employer representatives submitted that they were not consulted in the development of the anti-bullying measures proposed in the Bill. For example, the Victorian Employers' Chamber of Commerce and Industry stated:

> There has been a pitiful lack of consultation with the States ahead of these amendments and the Government has foisted this proposal on the FWC without regard for whether or not it is either resourced or capable of managing a bullying jurisdiction.[67]

3.57 ABI was also concerned by the apparent lack of consultation in the development of the anti-bullying measures.[68]

3.58 ACCI recommended that 'the best way forward is not to progress with these proposals until all stakeholders and the social partners consider how best to progress'.[69]

Committee comment

3.59 The Committee does not accept the concerns expressed by some business and industry groups that the anti-bullying measure has been developed without appropriate consultation. DEEWR noted that:

> the Minister for Employment and Workplace Relations, Minister Shorten, consulted with employer organisations and unions via the National Workplace Relations Consultative Council. The department also consulted on the details of the amendments at a number of separate meetings with the National Workplace Relations Consultative Council committee on industrial legislation

66 Budget Paper No.2 Budget Measures 2013-2014, Part 2: Expense Measures, Education Employment and Workplace Relations, http://www.budget.gov.au/2013-14/content/bp2/html/bp2_expense-09.htm

67 VECCI, *Submission 17*, p. 7.

68 ABI, *Submission 15*, pp. 19-24.

69 ACCI, *Submission 12*, p. 25.

> and also with state and territory officials. In conclusion, I would note that the bill represents a response to a further five recommendations of the Fair Work Act review panel, meaning that the government has responded to 23 of the panel's recommendations.[70]

3.60 Furthermore, this Committee consulted widely prior to making its original recommendation to the Commonwealth Government that an avenue of individual recourse be created within federal laws. The Committee travelled to every capital city, held 11 public hearings and received in excess of 300 submissions.[71]

3.61 During this six month inquiry, the Committee specifically sought feedback from key stakeholders – including business and industry – regarding the possibility of the Parliament legislating new powers for the Australian Government to respond to instances of workplace bullying within its constitutional ambit.

3.62 Finally, the referral of this Bill to both this Committee and the Senate Standing Committee on Education, Employment and Workplace Relations, are both methods of consultation and opportunities for business and industry to provide feedback.[72]

70 John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 25.

71 House of Representatives Standing Committee on Education and Employment, *Workplace Bullying: "We Just Want it to Stop"*, Canberra, October 2012, pp. 24-25.

72 Information regarding the Senate Committee's inquiry into the Bill available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/fair_work_2013/index.htm.

4

Schedules 2 & 4 – Modern awards objective and right of entry

4.1 This chapter examines proposed clauses contained in the Fair Work Amendment Bill 2013 (the Bill) amending the provisions of the *Fair Work Act 2009* (the Act) relating to the modern awards objective (Schedule 2) and right of entry provisions (Schedule 4).

Schedule 2 – Modern awards objective

4.2 Section 134 of the Act establishes the modern awards objective, requiring the Fair Work Commission (FWC) to ensure that modern awards, as well as the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. When assessing modern awards against the Act's stated objectives for modern awards, the FWC considers a range of factors including, but not limited to:

- the need to encourage collective bargaining;
- the need to promote social inclusion through increased workforce participation; and
- the need to promote flexible modern work practices and the efficient and productive performance of work.[1]

4.3 Schedule 2 proposes to amend the modern awards objective provided in s134(1)(d) of the Act to include the need to provide additional remuneration for:

- employees working overtime; or
- employees working unsocial, irregular or unpredictable hours; or

1 *Fair Work Act 2009*, s 134.

- employees working on weekends or public holidays; or
- employees working shifts.[2]

4.4 The amendments in Schedule 2 were not canvassed by the Fair Work Act Review Panel (the Review Panel).

Stakeholder feedback

4.5 The provisions of Schedule 2 were strongly supported by employee organisations and some legal advice services.[3] The Australian Council of Trade Unions (ACTU) commented that recognising the proposition that additional remuneration should be provided to employees working overtime, irregular hours, on weekends or in shifts, 'should be uncontroversial because it merely reflects the status quo … for over 100 years'.[4]

4.6 However, business and industry representatives did not support the measures.[5] The Australian Chamber of Commerce and Industry (ACCI) strongly opposed the provisions, commenting that the FWC's current powers make it 'more than capable to exercise its discretion in a manner which does not require further legislative direction'.[6] ACCI stated:

> The amendment would effectively elevate… discretionary terms to a de-facto mandatory status without any strong policy rational to justify this anomalous approach to deciding which terms should be included in the modern award safety-net. An approach which has not been contemplated in over 100 years of the federal [industrial relations] system.[7]

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2 Item 1, Schedule 2, Fair Work Amendment Bill 2013.

3 Australian Council of Trade Unions (ACTU), *Submission 9*, p. 14; National Working Women's Centres (NWWCs), *Submission 8*, p. 3, 5; United Services Union (USU), *Submission 26*, p. 3; Australian Nursing Federation (ANF), *Submission 22*, p. 2; Shop, Distributive and Allied Employees' Association (SDA), *Submission 37*, pp. 15-16; Textile, Clothing and Footwear Union of Australia (TCFUA), *Submission 39*, p. 6; Employment Law Centre of Western Australia (ELC), *Submission 40*, p. 3.

4 ACTU, *Submission 9*, p. 14.

5 Australian Chamber of Commerce and Industry (ACCI), *Submission 12*, p. 19; Business SA, *Submission 2*, p. 12; Master Builders Australia (MBA), *Submission 14*, p. 13; National Farmers' Federation (NFF), *Submission 3*, p. 17; Master Electricians Australia (MEA), *Submission 11*, p. 13; Housing Industry Association (HIA), *Submission 19*, p. 8; South Australian Wine Industry Association, *Submission 21*, p. 5; Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submission 17*, p. 6; Australian Mines & Metals Association (AMMA), *Submission 23*, p. 31; Australian Motor Industry Association (AMIF), *Submission 30*, p. 8; Business Council of Australia (BCA), *Submission 34*, p. 2; Australian Industry Group (AiG), *Submission 32*, p. 9; Australian Federation of Employers and Industries (AFEI), *Submission 38*, p. 13.

6 ACCI, *Submission 12*, pp. 19-20.

7 ACCI, *Submission 12*, p. 20.

4.7 The Australian Industry Group (AiG) noted that numerous awards already include the flexibility for an employer and an employee to reach agreement on an annual salary arrangement rather than paying penalty rates, stating that 'there is a significant risk that these vital flexibilities will be lost if the ill-conceived legislative change is made'.[8]

4.8 Business SA expressed strong concern that the clauses would 'effectively enshrine penalty rates in the Modern Awards'. The organisation further stated:

> Whilst overtime and penalty rates are a 'common' award provision, they are not contained in every award either because they are considered not appropriate for a particular industry or occupation, such as the real estate industry and professional employees awards … allow for employees to be compensated in another manner, such as annualised salaries.[9]

4.9 Business SA also commented that the clause would 'severely restrict' the FWC's review of modern awards.[10] Reiterating this line of opposition, Master Builders Australia (MBA) described the provision as 'inflexible in the extreme'.[11]

4.10 DEEWR clarified the application of penalty rates:

> In terms of penalty rates, in relation to the new modern awards objective this does not mean penalty rates must be included in all awards. The Fair Work Commission will retain the ability to determine the appropriate level of wages and penalty rates, if any, in modern awards, based on evidence presented by employer and employee representatives.[12]

Schedule 4 – Right of entry

4.11 The Act establishes rights of officials of organisations who hold entry permits to enter premises and exercise certain powers while on those premises.[13] It establishes a framework under which permit holders may enter premises for investigation and discussion purposes. The Explanatory Memorandum to the Bill commented that this existing framework

8 AiG, *Submission 32*, p. 9.

9 Business SA, *Submission 2*, p. 12.

10 Business SA, *Submission 2*, p. 12.

11 MBA, *Submission 14*, p. 13.

12 John Kovovic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 24.

13 *Fair Work Act 2009*, Part 3-4.

> appropriately balances the rights of organisations to represent their members in the workplace, the right of employees to be represented at work and the right of occupiers of premises and employers to go about their business without undue inconvenience.[14]

4.12 The Bill's amendments provide:

- for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which employees take meal or other breaks and is provided by the employer for that purpose;[15]
- FWC powers to deal with disputes about the frequency of visits to workplaces;[16]
- FWC powers to facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;[17] and
- FWC powers to deal with disputes in relation to accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement.[18]

4.13 DEEWR submitted that:

> Encouraging parties to agree to a location for interviews or discussions should assist to reduce the incidence of conflict between occupiers and permit holders. It will encourage parties to resolve any disputes between themselves by negotiating appropriate arrangements that meet the needs of both parties.[19]

4.14 DEEWR asserted that Schedule 4 would implements the Government's response to two of the three recommendations made by the Review Panel in relation to right of entry.[20]

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14 Explanatory Memorandum, Fair Work Amendment Bill 2013, p. 32.
15 Item 7, Schedule 4, Fair Work Amendment Bill 2013.
16 Item 12, Schedule 4, Fair Work Amendment Bill 2013.
17 Item 14, Schedule 4, Fair Work Amendment Bill 2013.
18 Item 10, Schedule 4, Fair Work Amendment Bill 2013.
19 DEEWR, *Submission 16*, p. 20.
20 DEEWR, *Submission 16*, p. 19.

Stakeholder feedback

4.15 The amendments to the right of entry provisions in Schedule 4 were strongly supported by employee organisations. [21]

4.16 For example, the Community and Public Sector Union (CPSU) believed the Bill's right of entry clauses are 'sensible proposals which will enhance employees' rights to representation in the workplace'.[22]

4.17 However, business and industry representatives strongly oppose these measures.[23] The most common grounds for objection to provisions proposed in Schedule 4 were:

- the measures exceed the recommendations of the Review panel;
- proposed FWC powers to resolve right of entry disputes; and
- transport and accommodation provisions.

Right of entry and location provisions

4.18 The Bill proposes to amend the Act so that interviews and discussions are held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which employees take meal or other breaks and is provided by the employer for that purpose.[24]

4.19 ACCI expressed strong concerns that the proposed amendments went beyond the recommendation of the Review Panel:

> There was no recommendation that a default position, absent of an agreement, would be the meal or other break locations at the workplace. … The Panel did not recommend any amendments to allow a statutory cap for costs associated with charging permit holders access to privately operated accommodation and transportation to remote sites.[25]

4.20 The Australian Mines & Metals Association (AMMA) submitted that the Bill's right of entry provisions should be amended to revert back to the Review Panel's recommendations. [26] The Review Panel recommended that

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21 ACTU, *Submission 9*, p. 22; Community and Public Sector Union (CPSU), *Submission 4*, p. 5; USU, *Submission 26*, p. 3; ANF, *Submission 22*, p. 2; TCFUA, *Submission 39*, p. 5.

22 CPSU, *Submission 4*, p. 5.

23 ACCI, *Submission 12*, p. 27; Business SA, *Submission 2*, p. 16; Godfrey Hirst Australia Pty Ltd, *Submission 13*, p. 5; MBA, *Submission 14*, p. 19; Australian Business Industrial (ABI), *Submission 15*, p. 25; HIA, *Submission 19*, p. 9; VECCI, *Submission 17*, p. 8; AMMA, *Submission 23*, p. 7; BCA, *Submission 34*, p. 1; AiG, *Submission 32*, p. 11; Rio Tinto, *Submission 35*, p. 4; AFEI, *Submission 38*, p. 22;

24 Item 7, Schedule 4, Fair Work Amendment Bill 2013.

25 ACCI, *Submission 12*, pp. 27-28; MEA, *Submission 11*, p. 17.

26 AMMA, *Submission 23*, p. 9.

the Act be amended to provide the FWC with greater power to resolve disputes about the frequency of visits, and the location 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.[27]

4.21 Rio Tinto and the international law firm based in Australia, Allens, expressed similar concerns.[28]

4.22 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions countered industry and employers concerns with the unions' stance that the lunchroom is an appropriate default position. He asserted:

> In relation to location it is important to note that our right to have discussions with employees is a right which can only be exercised in unpaid time- that is during people's meal breaks. In those circumstances we do think it is appropriate that the default position is that, unless otherwise agreed, people can have that right where they are normally taking their break. In fact, that is the way that the legislation operated prior to 2006. The default position was lunch room access.[29]

4.23 The ACTU pointed to examples of inappropriate venues to conduct right-of-entry discussions cited by affiliate members:

> meeting rooms next to employers' offices and places which are a large distance from where workers are actually taking what might be quite short meal breaks- as short as 20 minutes. These kinds of things functionally remove the rights of entry.[30]

4.24 The Community and Public Sector Union added that they thought the new provisions sensible. Ms Nadine Flood, National Secretary referenced further unsuitable scenarios:

> such as one [instance] we had recently where a union organiser was told the room available was a desk in the middle of the management area of the workplace and workers would sit next to that desk if they chose to access that union representative. They

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27 Fair Work Act Review Panel, *Towards more productive and equitable workplaces*, Canberra, June 2012, (Recommendations 35, 36), pp. 195-197.

28 Rio Tinto, *Submission 35*, p. 4; Allens, *Submission 28*, p. 2.

29 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Committee Hansard*, 24 May 2013, Melbourne, p. 2.

30 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Committee Hansard*, 24 May 2013, Melbourne, p. 2.

> are quite powerful and intimidating examples, particularly for the women that we predominantly represent.[31]

4.25 Ms Flood emphasised that union representative discussions with employers often took place with staff in rooms, other than a lunchroom, on employees request:

> …there are often cases where…workers would prefer a private room to have a more confidential discussion with a union organiser around the issues that they are raising with their employer. Often those workplaces are where they feel somewhat intimidated or they have a view that their employer is anti-union.[32]

Fair Work Commission powers to resolve right of entry disputes

4.26 The Bill grants new powers to the FWC to resolve the following right of entry disputes:

- disputes about the frequency of visits to workplaces;[33]
- disputes about accommodation and transport arrangements for permit holders in remote areas and the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;[34] and
- disputes about accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement.[35]

4.27 Reflecting stakeholder support for the FWC to have a role in resolving disputes about right of entry as originally recommended by the Review Panel, there was broad support for this clause.

4.28 The ACTU, AiG, MBA, Australian Motor Industry Federation and the Law Society of New South Wales expressed support for the FWC to be granted powers to hear disputes regarding the frequency and location of visits by permit holders to worksites, as originally recommended by the Review Panel.[36] However, while providing general support for the proposal, some

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31 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard,* 24 May 2013, Melbourne, p. 3.

32 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard,* 24 May Melbourne, p. 4.

33 Item 12, Schedule 4, Fair Work Amendment Bill 2013.

34 Item 14, Schedule 4, Fair Work Amendment Bill 2013.

35 Item 10, Schedule 4, Fair Work Amendment Bill 2013.

36 ACTU, *Submission 9*, p. 23; AiG, *Submission* 32, p. 14; MBA, *Submission 14*, p. 20; AMIF, *Submission 30*, p. 10; Law Society of NSW, *Submission 6*, p. 7.

of these stakeholders expressed concern with regard to the specifics of the clause. [37]

4.29 ACTU expressed some concern that the Bill should set a 'high bar' before the FWC 'restricts the rights of permit holders'.[38] Similar comments were made by the Textile, Clothing and Footwear Union of Australia.[39] By contrast, the MBA was concerned that the Bill 'appears to place [a] high threshold' when the FWC adjudicates the frequency of permit holders' visits.[40]

4.30 The AiG expressed concern that the provision, as currently drafted, is 'inadequate to address the problem identified by the Review Panel' explaining that:

> the amendment gives the FWC a very limited discretion to deal with a dispute about the frequency of visits. The statutory test in subsection 505(4) requiring the employer to explain how the frequency of visits of the permit holder would be an unreasonable diversion of the occupier's critical resources, would place a very onerous evidentiary burden on the employer. The inclusion of the word 'critical' imposes a test that would be virtually impossible to meet.[41]

Transport and accommodation provisions to remote locations

4.31 Part 3-4 of Schedule 4 of the bill proposes to amend the Act to facilitate assistance with transport and accommodation for permit holders at remote sites and limit the amounts that an occupier can charge a permit holder for provision of accommodation or transport at remote sites to cost recovery.

4.32 The Australian Mines & Metals Association (AMMA) expressed strong reservation at the accommodation and transport provisions to remote locations of the Bill's right of entry clauses:

> 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

37 TCFUA, *Submission 39*, p. 21.
38 ACTU, *Submission 9*, p. 23 .
39 TCFUA, *Submission 39*, p. 21.
40 MBA, *Submission 14*, p. 20.
41 AiG, *Submission 32*, p. 15.

> arrangements if they require such transport to access remote worksites.[42]

4.33 AMMA expressed a range of concerns about union visits to their remote sites, including having sufficient separate sleeping accommodation for permit holders, in the context of accommodation shortages being experienced, particularly in the offshore hydrocarbons sector. The AMMA intimated that employers' flexibility would be compromised; employees might be inconvenienced in order that the union officials be able to be accommodated in separate quarters and that additional costs would be borne by the employer for cleaning their rooms.[43]

4.34 DEEWR clarified the meaning of a remote site:

> A remote site is really a site that there is no other way of accessing other than by employer-provided transport. For instance, in the discussions that we have had with a number of stakeholders around the provisions of the bill, the sorts of areas that cropped up were pastoral properties. For instance, if a pastoral property can be reached by way of road, either the permit holder using their own vehicle or one provided by the organisation that they represent, it would not be covered by the provisions. Similarly, if the permit holder was able to fly to a nearby airport and then do the rest of the trip by way of car or road or whatever, it would not be captured by the provisions of the bill. It is really those circumstances where the only means that the permit holder has of accessing the work site is by way of employer-provided transport.[44]

4.35 The ACTU outlined some instances of the obstructions that are occurring the Bill is seeking to remedy:

> The Maritime Union gave direct evidence to the Senate Committee…in relation to this. It is essentially that there is a sub-category of industrial sites, particularly in the resources sector, where it is simply impossible to access the site via normal commercial means, or under your own recognisance…Therefore you are dependent on the transport and accommodation the employer provides, whether those are chartered flights of one form or another or vehicular transport from some form of hub. The examples that have been set out in the submissions that have

42 AMMA, *Submission 23*, pp. 9-10.

43 AMMA, *Submission 23*, pp. 9-10.

44 John Kovovic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 25

> been made by our affiliates go to the practical cases, where they are denied access to that transport or they are offered access at very excessive costs- in other words, a prohibitive cost which is, in our view and the view of our affiliates, more than it would have cost the employer to provide in the first place.[45]

Committee comments

4.36 The Committee recognises that there are opposing interests and views about the desirability of the measures proposed by this Bill.

4.37 However, given the extensive consultation that has taken place on the proposals put forth in this Bill, the Committee is of the opinion that it provides an appropriate balance in addressing the policy intent of the Bill.

4.38 Accordingly, the Committee recommends that the House of Representatives pass the Fair Work Amendment Bill 2013.

Recommendation 1

4.39 **The Committee recommends that the House of Representatives pass the Fair Work Amendment Bill 2013.**

Mike Symon MP
Chair

45 Mr Tim Lyons, Associate Secretary, ACTU, *Committee Hansard*, 24 May Melbourne, p. 4.

Appendix A – Text of the Bill

2010-2011-2012-2013

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Fair Work Amendment Bill 2013

No. , 2013

(Education, Employment and Workplace Relations)

A Bill for an Act to amend the *Fair Work Act 2009*, and for related purposes

Contents

A Bill for an Act to amend the *Fair Work Act 2009*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Fair Work Amendment Act 2013*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1, Parts 1 to 3	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	

Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
3. Schedule 1, Part 4	1 January 2014.	1 January 2014
4. Schedule 1, Part 5	At the same time as the provision(s) covered by table item 2.	
5. Schedule 2	1 January 2014.	1 January 2014
6. Schedule 3	At the same time as the provision(s) covered by table item 2.	
7. Schedule 4	1 January 2014.	1 January 2014
8. Schedule 5, item 1	Immediately after the commencement of the *Fair Work Amendment (Transfer of Business) Act 2012*.	5 December 2012
9. Schedule 5, item 2	Immediately after the commencement of Schedule 1 to the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*.	1 July 2012
10. Schedule 5, item 3	At the same time as the provision(s) covered by table item 2.	
11. Schedule 6, item 1	Immediately after the commencement of Schedule 1 to the *Fair Work Amendment Act 2012*.	1 January 2014
12. Schedule 6, items 2 to 4	The day this Act receives the Royal Assent.	
13. Schedule 6, item 5	Immediately after the commencement of Schedule 2 to the *Fair Work Amendment Act 2012*.	1 July 2013
14. Schedule 6, items 6 to 8	The day this Act receives the Royal Assent.	
15. Schedule 6, items 9 and 10	Immediately after the commencement of Schedule 8 to the *Fair Work Amendment Act 2012*.	1 January 2013
16. Schedule 6, items 11 to 13	Immediately after the commencement of Part 1 of Schedule 9 to the *Fair Work Amendment Act 2012*.	1 January 2013
17. Schedule 6, item 14	Immediately after the commencement of item 1364 of Schedule 9 to the *Fair Work Amendment Act 2012*.	1 January 2013
18. Schedule 7	The day this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Family-friendly measures

Part 1—Special maternity leave

Fair Work Act 2009

1 Section 70 (note 1)

Omit "Note 1", substitute "Note".

2 Section 70 (note 2)

Repeal the note.

3 Paragraph 75(2)(c)

Omit ";", substitute ".".

4 Paragraph 75(2)(d)

Repeal the paragraph.

5 Paragraph 76(6)(a)

Omit "and unpaid special maternity leave".

6 Paragraph 76(6)(b)

Omit "or unpaid special maternity leave".

7 Subsection 80(1) (note)

Omit "Note", substitute "Note 1".

8 At the end of subsection 80(1)

Add:

Note 2: If a female employee has an entitlement to paid personal/carer's leave (see section 96), she may take that leave instead of taking unpaid special maternity leave under this section.

9 Subsection 80(7)

Repeal the subsection (not including the note).

10 Section 97 (note)

Omit "Note", substitute "Note 1".

11 At the end of section 97

Add:

Note 2: If a female employee has an entitlement to paid personal/carer's leave, she may take that leave instead of taking unpaid special maternity leave under section 80.

Part 2—Parental leave

Fair Work Act 2009

12 Section 12

Insert:

concurrent leave: see subsection 72(5).

13 Paragraphs 72(5)(a), (b) and (c)

Repeal the paragraphs, substitute:

(a) the concurrent leave must not be longer than 8 weeks in total;

(b) the concurrent leave may be taken in separate periods, but, unless the employer agrees, each period must not be shorter than 2 weeks;

(c) unless the employer agrees, the concurrent leave must not start before:

(i) if the leave is birth-related leave—the date of birth of the child; or

(ii) if the leave is adoption-related leave—the day of placement of the child.

14 Subsection 74(2)

Repeal the subsection, substitute:

(2) The employee must give the notice to the employer:

(a) at least:

(i) 10 weeks before starting the leave, unless subparagraph (ii) applies; or

(ii) if the leave is to be taken in separate periods of concurrent leave (see paragraph 72(5)(b)) and the leave is not the first of those periods of concurrent leave—4 weeks before starting the period of concurrent leave; or

(b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).

15 After subsection 74(4)

Insert:

(4A) Subsection (4) does not apply to a notice for a period of concurrent leave referred to in subparagraph (2)(a)(ii).

Part 3—Right to request flexible working arrangements

Fair Work Act 2009

16 Section 12 (definition of *school age*)

Omit "start attending", substitute "attend".

17 Subsection 65(1)

Repeal the subsection, substitute:

Employee may request change in working arrangements

(1) If:

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

(b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(1A) The following are the circumstances:

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing violence from a member of the employee's family;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

18 After subsection 65(5)

Insert:

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(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.

Part 4—Consultation about changes to rosters or working hours

Fair Work Act 2009

19 After section 145

Insert:

145A Consultation about changes to rosters or hours of work

(1) Without limiting paragraph 139(1)(j), a modern award must include a term that:

(a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and

(b) allows for the representation of those employees for the purposes of that consultation.

(2) The term must require the employer:

(a) to provide information to the employees about the change; and

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views about the impact of the change that are given by the employees.

20 Paragraph 205(1)(a)

Repeal the paragraph, substitute:

(a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:

(i) a major workplace change that is likely to have a significant effect on the employees; or

(ii) a change to their regular roster or ordinary hours of work; and

21 After subsection 205(1)

Insert:

(1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:

(a) to provide information to the employees about the change; and

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views given by the employees about the impact of the change.

Part 5—Transfer to a safe job

Fair Work Act 2009

22 Section 12 (definition of *appropriate safe job*)

Omit "subsection 81(4)", substitute "subsection 81(3)".

23 Section 12 (definition of *paid no safe job leave*)

Omit "paragraph 81(3)(b)", substitute "section 81A".

24 Section 12

Insert:

risk period: see subsections 81(1) and (5).

unpaid no safe job leave means unpaid no safe job leave to which a national system employee is entitled under section 82A.

25 Subsections 67(1) and (2)

After "unpaid pre-adoption leave", insert "or unpaid no safe job leave".

26 Subsection 71(3) (note 2)

Repeal the note, substitute:

Note 2: If it is inadvisable for the employee to continue in her present position, she may be entitled:
(a) to be transferred to an appropriate safe job under section 81; or
(b) to paid no safe job leave under section 81A; or
(c) to unpaid no safe job leave under section 82A.

27 Subparagraph 73(2)(c)(ii)

Repeal the subparagraph, substitute:

(ii) the employee has not complied with the notice and evidence requirements of section 74 for taking unpaid parental leave.

28 Subsection 73(2) (note)

Repeal the note, substitute:

Note: If the medical certificate contains a statement as referred to in subparagraph (c)(i) and the employee has complied with the notice and evidence requirements of section 74, then the employee is entitled to be transferred to a safe job (see section 81) or to paid no safe job leave (see section 81A).

29 Section 81

Repeal the section, substitute:

81 Transfer to a safe job

(1) This section applies to a pregnant employee if she gives her employer evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her present position during a stated period (the ***risk period***) because of:
(a) illness, or risks, arising out of her pregnancy; or
(b) hazards connected with that position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

(2) If there is an appropriate safe job available, then the employer must transfer the employee to that job for the risk period, with no other change to the employee's terms and conditions of employment.

Note: If there is no appropriate safe job available, then the employee may be entitled to paid no safe job leave under section 81A or unpaid no safe job leave under 82A.

(3) An ***appropriate safe job*** is a safe job that has:

(a) the same ordinary hours of work as the employee's present position; or

(b) a different number of ordinary hours agreed to by the employee.

(4) If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position she was in before the transfer) for the hours that she works in the risk period.

(5) If the employee's pregnancy ends before the end of the risk period, the ***risk period*** ends when the pregnancy ends.

(6) Without limiting subsection (1), an employer may require the evidence to be a medical certificate.

81A Paid no safe job leave

(1) If:

(a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and

(b) the employee is entitled to unpaid parental leave; and

(c) the employee has complied with the notice and evidence requirements of section 74 for taking unpaid parental leave;

then the employee is entitled to paid no safe job leave for the risk period.

(2) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period.

30 After section 82

Insert:

82A Unpaid no safe job leave

(1) If:

(a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and

(b) the employee is not entitled to unpaid parental leave; and

(c) if required by the employer—the employee has given the employer evidence that would satisfy a reasonable person of the pregnancy;

then the employee is entitled to unpaid no safe job leave for the risk period.

(2) Without limiting subsection (1), an employer may require the evidence referred to in paragraph (1)(c) to be a medical certificate.

Schedule 2—Modern awards objective

Fair Work Act 2009

1 After paragraph 134(1)(d)

Insert:

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

Schedule 3—Anti-bullying measure

Fair Work Act 2009

1 After subsection 9(5A)

Insert:

(5B) Part 6-4B allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

2 Section 12

Insert:

bullied at work: see subsection 789FD(1).

constitutionally-covered business: see subsection 789FD(3).

worker:

(a) in Part 6-4B—see subsection 789FC(2); and

(b) otherwise—has its ordinary meaning.

3 Subsection 539(2) (at the end of the table)

Add:

Part 6-4B—Workers bullied at work				
38	789FG	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units

4 At the end of subsection 576(1)

Add:

; (q) workers bullied at work (Part 6-4B).

5 At the end of subsection 675(2)

Add:

; (j) an order under Part 6-4B (which deals with workers bullied at work).

6 After Part 6-4A

Insert:

Part 6-4B—Workers bullied at work

Division 1—Introduction

789FA Guide to this Part

This Part allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

789FB Meanings of *employee* and *employer*

In this Part, ***employee*** and ***employer*** have their ordinary meanings.

Division 2—Stopping workers being bullied at work

789FC Application for an FWC order to stop bullying

(1) A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order under section 789FF.

(2) For the purposes of this Part, ***worker*** has the same meaning as in the *Work Health and Safety Act 2011*.

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

(3) The application must be accompanied by any fee prescribed by the regulations.

(4) The regulations may prescribe:
- (a) a fee for making an application to the FWC under this section; and
- (b) a method for indexing the fee; and
- (c) the circumstances in which all or part of the fee may be waived or refunded.

789FD When is a worker *bullied at work*?

(1) A worker is ***bullied at work*** if:
- (a) while the worker is at work in a constitutionally-covered business:
  - (i) an individual; or
  - (ii) a group of individuals;

  repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
- (b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:
- (a) the person is:
  - (i) a constitutional corporation; or
  - (ii) the Commonwealth; or
  - (iii) a Commonwealth authority; or
  - (iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a ***constitutionally-covered business***.

789FE FWC to deal with applications promptly

The FWC must start to deal with an application under section 789FC within 14 days after the application is made.

Note: For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.

789FF FWC may make orders to stop bullying

(1) If:

(a) a worker has made an application under section 789FC; and

(b) the FWC is satisfied that:

(i) the worker has been bullied at work by an individual or a group of individuals; and

(ii) there is a risk that the worker will continue to be bullied at work by the individual or group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

(2) In considering the terms of an order, the FWC must take into account:

(a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and

(b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and

(c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and

(d) any matters that the FWC considers relevant.

789FG Contravening an order to stop bullying

A person to whom an order under section 789FF applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

789FH Actions under work health and safety laws permitted

Section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application under section 789FC.

Note: Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied at work, then section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the bullying. This section removes that prohibition.

Schedule 4—Right of entry

Fair Work Act 2009

1 Section 12

Insert:

accommodation arrangement: see subsections 521A(1) and (2).

transport arrangement: see subsections 521B(1) and (2).

2 At the end of section 478

Add:

Division 7 deals with accommodation and transport arrangements in remote areas.

3 At the end of subsection 481(1)

Add:

Note 3: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 4: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

4 Subsection 483A(1) (note)

Omit "Note", substitute "Note 1".

5 At the end of subsection 483A(1)

Add:

Note 2: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 3: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

6 At the end of section 484

Add:

Note 1: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 2: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

Note 3: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold discussions with any person on the premises described in this section.

7 Section 492

Repeal the section, substitute:

492 Location of interviews and discussions

(1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.

(2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.

(3) The permit holder may conduct the interview or hold the discussions in any room or area:

(a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and

(b) that is provided by the occupier for the purpose of taking meal or other breaks.

Note 1: The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused.

Note 2: A person must not intentionally hinder or obstruct a permit holder exercising rights under this section (see section 502).

492A Route to location of interview and discussions

(1) The permit holder must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premises determined under section 492.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

(2) A request under subsection (1) is not unreasonable only because the route is not that which the permit holder would have chosen.

(3) The regulations may prescribe circumstances in which a request under subsection (1) is or is not reasonable.

8 Section 500 (note)

Omit "Note", substitute "Note 1".

9 At the end of section 500

Add:

Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.

Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502).

10 Subsection 505(1)

Repeal the subsection, substitute:

(1) The FWC may deal with a dispute about the operation of this Part, including a dispute about:

(a) whether a request under section 491, 492A or 499 is reasonable; or

(b) when a right of the kind referred to in section 490 may be exercised by a permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or

(c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or

(d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or

(e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

Note 1: Sections 491 and 499 deal with requests for permit holders to comply with occupational health and safety requirements.

Note 2: Section 492A deals with requests for a permit holder to take a particular route to a room or area in which an interview is to be conducted or discussions held.

Note 3: Section 490 deals with when rights under Subdivision A, AA or B of Division 2 of this Part may be exercised.

Note 4: Sections 521C and 521D deal with accommodation in and transport to remote areas for the purpose of exercising rights under this Part.

11 Subsection 505(5)

Repeal the subsection, substitute:

(5) In dealing with the dispute, the FWC must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2, 3 or 7 of this Part, unless the dispute is about:

(a) whether a request under section 491, 492A or 499 is reasonable; or

(b) when a right of the kind referred to in section 490 may be exercised by the permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or

(c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or

(d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or

(e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

12 After section 505

Insert:

505A FWC may deal with a dispute about frequency of entry to hold discussions

(1) This section applies if:

(a) a permit holder or permit holders of an organisation enter premises under section 484 for the purposes of holding discussions with one or more employees or TCF award workers; and

(b) an employer of the employees or the TCF award workers, or occupier of the premises, disputes the frequency with which the permit holder or permit holders of the organisation enter the premises.

(2) The FWC may deal with a dispute about the frequency with which a permit holder or permit holders of an organisation enter premises under section 484.

(3) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order imposing conditions on an entry permit;

(b) an order suspending an entry permit;

(c) an order revoking an entry permit;
(d) an order about the future issue of entry permits to one or more persons;
(e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(4) However, the FWC may only make an order under subsection (3) if the FWC is satisfied that the frequency of entry by the permit holder or permit holders of the organisation would require an unreasonable diversion of the occupier's critical resources.

(5) The FWC may deal with the dispute:
(a) on its own initiative; or
(b) on application by any of the following to whom the dispute relates:
(i) a permit holder;
(ii) a permit holder's organisation;
(iii) an employer;
(iv) an occupier of premises.

(6) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

13 At the end of section 506

Add "or subsection 505A(3)".

14 At the end of Part 3-4

Add:

Division 7—Accommodation and transport arrangements in remote areas

521A Meaning of *accommodation arrangement*

(1) If:
(a) an occupier of premises enters into an arrangement with an organisation; and
(b) under the terms of the arrangement, a permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is an ***accommodation arrangement***.

(2) If:
(a) an occupier of premises enters into an arrangement with a permit holder; and
(b) under the terms of the arrangement, the permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is an ***accommodation arrangement***.

521B Meaning of *transport arrangement*

(1) If:
(a) an occupier of premises enters into an arrangement with an organisation; and

(b) under the terms of the arrangement, a permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is a ***transport arrangement***.

(2) If:

(a) an occupier of premises enters into an arrangement with a permit holder; and

(b) under the terms of the arrangement, the permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is a ***transport arrangement***.

521C Accommodation arrangements for remote areas

This section applies only in remote areas

(1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided.

Where parties cannot agree on an accommodation arrangement

(2) If all of the following are satisfied:

(a) to provide accommodation, or cause accommodation to be provided, to the permit holder would not cause the occupier undue inconvenience;

(b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, accommodation for the purpose of assisting the permit holder to exercise rights under this Part on the premises;

(c) the request is made within a reasonable period before accommodation is required;

(d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into an accommodation arrangement with the occupier by consent;

the occupier must enter into an accommodation arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether accommodation is reasonably available, whether providing accommodation or causing it to be provided would cause the occupier undue inconvenience and whether a request to provide accommodation is made within a reasonable period (see subsection 505(1)).

Costs

(3) If an accommodation arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for accommodation under the arrangement that is more than is necessary to cover the cost to the occupier of providing the accommodation, or causing it to be provided.

Note: This subsection is a civil remedy provision (see Part 4-1).

FWC's powers if rights misused whilst in accommodation

(4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in accommodation under an accommodation arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

521D Transport arrangements for remote areas

This section applies only in remote areas

(1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place that is not reasonably accessible to the permit holder unless the occupier of the premises on which the rights are to be exercised provides transport, or causes it to be provided.

Where parties cannot agree on transport arrangement

(2) If all of the following are satisfied:

(a) to provide transport to the premises for the permit holder, or cause that transport to be provided, would not cause the occupier undue inconvenience;

(b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, transport to the premises for the purpose of assisting the permit holder to exercise rights under this Part;

(c) the request is made within a reasonable period before transport is required;

(d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into a transport arrangement with the occupier by consent;

the occupier must enter into a transport arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether premises are reasonably accessible, whether providing transport or causing it to be provided would cause the occupier undue inconvenience and whether a request to provide transport is made within a reasonable period (see subsection 505(1)).

Costs

(3) If a transport arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for transport under the arrangement that is more than is necessary to cover the cost to the occupier of providing the transport, or causing it to be provided.

Note: This subsection is a civil remedy provision (see Part 4-1).

FWC's powers if rights misused whilst in transport

(4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in transport under a transport arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

15 Subsection 539(2) (at the end of the cell at table item 25, column headed "Civil remedy provision")

Add:

521C(3)
521D(3)

Schedule 5—Functions of the FWC

Fair Work Act 2009

1 After paragraph 576(1)(n)

Insert:

(na) transfer of business from a State public sector employer (Part 6-3A);

2 At the end of subsection 576(1)

Add:

; (p) special provisions about TCF outworkers (Part 6-4A).

3 Before paragraph 576(2)(a)

Insert:

(aa) promoting cooperative and productive workplace relations and preventing disputes;

Schedule 6—Technical amendments

Fair Work Act 2009

1 Section 12 (definition of *default fund employee*)

Omit "149A(2)", substitute "149C(2)".

Note: This item fixes an incorrect cross-reference.

2 Subsection 176(4)

Omit "subsection (3),,", substitute "subsection (3),".

Note: This item fixes incorrect punctuation.

3 Subsection 400(1)

Omit "FWA" (wherever occurring), substitute "the FWC".

Note: This item fixes an incorrect reference.

4 Subsection 515(5)

Omit "an the FWC order", substitute "an FWC order".

Note: This item fixes a grammatical error.

5 Paragraph 584(1)(a)

Omit "the Minimum Wage Panel", substitute "an Expert Panel".

Note: This item fixes an incorrect reference.

6 Subsection 603(1)

Omit "of The FWC", substitute "of the FWC".

Note: This item fixes a grammatical error.

7 Subsection 603(1) (note)

Omit "The FWC" (wherever occurring), substitute "the FWC".

Note: This item fixes a grammatical error.

8 Paragraph 670(2)(a)

Omit "FWA", substitute "the FWC".

Note: This item fixes an incorrect reference.

Fair Work Amendment Act 2012

9 Item 40 of Schedule 8 (heading)

Repeal the heading, substitute:

40 Subsection 644(1) (heading)

Note: This item fixes a misdescribed amendment.

10 Item 41 of Schedule 8

Omit "Deputy President,", substitute "Deputy President".

Note: This item fixes a misdescribed amendment.

11 Item 414 of Schedule 9 (heading)

Repeal the heading, substitute:

414 Subsection 400(2)

Note: This item fixes a misdescribed amendment.

12 Item 1144 of Schedule 9

Omit "FWC's" (first occurring), substitute "FWA's".

Note: This item fixes a misdescribed amendment.

13 Item 1252 of Schedule 9

Repeal the item, substitute:

1252 Subitem 2(1) of Schedule 20

Omit "FWA" (wherever occurring), substitute "the FWC".

Note: This item fixes a misdescribed amendment.

14 Item 1364 of Schedule 9

Repeal the item.

Note: This item repeals an item made redundant by other amendments.

Schedule 7—Application and transitional provisions

Fair Work Act 2009

1 After Schedule 3

Insert:

Schedule 4—Amendments made by the Fair Work Amendment Act 2013

Note: See section 795A.

Part 1—Preliminary

1 Definition

In this Schedule:

amending Act means the *Fair Work Amendment Act 2013*.

Part 2—Family-friendly measures (Schedule 1)

2 Part 1 of Schedule 1 to the amending Act

The amendments made by Part 1 of Schedule 1 to the amending Act apply in relation to a period of unpaid special maternity leave that starts after the commencement of that Part.

3 Part 2 of Schedule 1 to the amending Act

The amendments made by Part 2 of Schedule 1 to the amending Act apply in relation to the taking of unpaid parental leave by members of an employee couple if the first taking of leave by either member of the employee couple occurs after the commencement of that Part.

4 Part 3 of Schedule 1 to the amending Act

The amendments made by Part 3 of Schedule 1 to the amending Act apply in relation to a request that is made under subsection 65(1) after the commencement of that Part.

5 Part 4 of Schedule 1 to the amending Act

Application of amendments

(1) The amendment made by item 19 of Schedule 1 to the amending Act applies in relation to a modern award that is in operation on or after 1 January 2014, whether or not the award was made before that day.

(2) The amendments made by items 20 and 21 of Schedule 1 to the amending Act apply in relation to an enterprise agreement that is made after the commencement of that Schedule.

Transitional provision

(3) If:

(a) a modern award is made before 1 January 2014; and

(b) the modern award is in operation on that day; and

(c) immediately before that day, the modern award does not include a term (the ***relevant term***) of the kind mentioned in section 145A (as inserted by item 19 of Schedule 1 to the amending Act);

then the FWC must, by 31 December 2013, make a determination varying the modern award to include the relevant term.

(4) A determination made under subclause (3) comes into operation on (and takes effect from) 1 January 2014.

(5) Section 168 applies to a determination made under subclause (3) as if it were a determination made under Part 2-3.

6 Part 5 of Schedule 1 to the amending Act

The amendments made by Part 5 of Schedule 1 to the amending Act apply in relation to evidence that is given under section 81 after the commencement of that Part.

Part 3—Modern awards objective (Schedule 2)

7 Schedule 2 to the amending Act

The amendment made by Schedule 2 to the amending Act applies in relation to a modern award that is made or varied after the commencement of that Schedule.

Part 4—Anti-bullying measure (Schedule 3)

8 Schedule 3 to the amending Act

The amendments made by Schedule 3 to the amending Act apply in relation to an application that is made under section 789FC (as inserted by item 6 of that Schedule) after the commencement of that Schedule.

Part 5—Right of entry (Schedule 4)

9 Schedule 4 to the amending Act

Application of amendment relating to sections 492 and 492A

(1) The amendment made by item 7 of Schedule 4 to the amending Act applies in relation to interviews conducted and discussions held after the commencement of that item.

Application of amendments relating to section 505A

(2) The amendments made by items 12 and 13 of Schedule 4 to the amending Act apply in relation to the frequency of entry after the commencement of those items.

Application of amendments relating to accommodation arrangements and transport arrangements

(3) The amendments made by items 14 and 15 of Schedule 4 to the amending Act do not apply in relation to arrangements entered into before the commencement of those items.

B

Appendix B – Submissions

1 Mr Eric Windholz
2 Business SA
3 National Farmers' Federation
4 Community and Public Sector Union
5 Australian Nursing Federation (Victorian Branch)
6 The Law Society of New South Wales
7 Northern Territory Government
8 The National Working Women's Centres
9 Australian Council of Trade Unions
10 Carers Victoria
11 Master Electricians Australia
12 Australian Chamber of Commerce and Industry
12.1 Australian Chamber of Commerce and Industry
13 Godfrey Hirst Australia Pty Ltd
14 Master Builders Australia Ltd
15 Australian Business Industrial
16 Department of Education, Employment and Workplace Relations
17 Victorian Employers' Chamber of Commerce and Industry
18 Chamber of Commerce and Industry of WA Inc
19 Housing Industry Association Ltd
20 Australian Domestic and Family Violence Clearinghouse
20.1 Australian Domestic and Family Violence Clearinghouse

21 South Australian Wine Industry Association Incorporated
22 Australian Nursing Federation
23 Australian Mines & Metals Association (AMMA)
24 Australian Public Transport Industrial Association
25 Accommodation Association of Australia
26 United Services Union
27 Australian Human Rights Commission
28 Allens
29 Australian Manufacturing Workers Union
30 Australian Motor Industry Federation
31 Launceston Community Legal Centre Inc.
32 Australian Industry Group
32.1 Australian Industry Group SUPPLEMENTARY (to Submission No. 32)
33 Queensland Law Society
34 Business Council of Australia
35 Rio Tinto
36 Bradley John Beasley
37 Shop, Distributive and Allied Employees Association
38 Australian Federation of Employers and Industries
39 Textile, Clothing and Footwear Union of Australia
40 Employment Law Centre of WA (Inc)
41 Law Council of Australia
41.1 Law Council of Australia SUPPLEMENTARY (to Submission No. 41)

C

Appendix C – Witnesses and hearings

Friday, 24 May 2013 - Melbourne

Australian Business Industrial

Mr Dick Grozier, Director Industrial Relations

Australian Chamber of Commerce and Industry

Mr Daniel Mammone, Director, Workplace Relations & Legal Affairs

Ms Marie-Luise Mick, Policy Research Assistant – Workplace Policy/Legal Affairs

Australian Council of Trade Unions

Mr Trevor Clarke, Senior Legal and Industrial Officer

Mr Tim Lyons, Assistant Secretary

Australian Domestic and Family Violence Clearinghouse

Ms Ludo McFerran, Project Manager, Safe at Home, Safe at Work,

Australian Industry Group

Mr Stephen Smith, Director, National Workplace Relations

Carers Victoria

Mr Ben Ilsley, Policy Advisor

Community and Public Sector Union

Ms Melissa Donnelly, Director, Political, Industrial, Research and Legal Team

Ms Nadine Flood, National Secretary

Department of Education, Employment and Workplace Relations

Mr David Bell, Principle Government Lawyer

Ms Joanne Hutchinson, Branch Manager

Mr John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy

Mr Jeremy O'Sullivan, Chief Counsel, Workplace Relations Legal Group

Mr Adrian Breen, A/g Branch Manager, Workplace Relations Legal Group

NT Working Women's Centre

Ms Anna Davis, Co-Coordinator

Ms Rachael Uebergang, Co-Coordinator

Dissenting Report—Mr Rowan Ramsey MP, Mrs Karen Andrews MP, Mr Alan Tudge MP, Ms Nola Marino MP

The Coalition Members of the House Standing Committee on Education and Employment do not support the government members recommendation that this bill be passed.

Introduction

The bill, supposedly a response to the Review of Fair Work Australia goes far beyond the review's recommendations in areas which grant greater power to the unions and in areas which address possible productivity gains it is silent.

It departs significantly from the government's mandate in these areas and contradicts earlier commitments from the government.

Lack of Proper Process

Additionally the bill, which the government seems intent on passing in the dying days of the 43rd parliament, proposes significant changes to the industrial system and as there is little likelihood of any of the provisions being implemented before the election its passage should not be considered until after the election.

Further, the dissenting members are deeply concerned that the avalanche of legislation currently before the Parliament is overwhelming the Parliamentary Committee system and due consideration is being subjugated by that surge.

House of Representatives Standing Committees are given the very important task of exploring legislation to identify deficiencies and flaws before bills are considered by the parliament. It is a great concern to the Coalition Members that such wide-ranging legislation received such short consideration.

The committee received 41 submissions and held just a half day hearing in Melbourne where three roundtables were conducted. The Coalition Members are of the opinion that this hearing was not sufficient to explore the implications of a bill which among other matters proposes increased right of entry to unions, increased obligations to employers to provide transport to union officials, increased leave entitlements, extends negotiation requirements over roster changes, attempts to reduce flexibility in the workplace by enshrining penalty rates and introduces compulsory arbitration for workplace bullying claims.

The Coalition Members were also deeply concerned the bill was specifically exempted from issuing a Regulatory Impact Statement and were not provided with any cohesive argument as to why this was justified. Neither was the bill considered for a cost/benefit analysis.

A Poor Case for Change

It is quite clear that this legislation flies in direct contradiction to earlier commitments from the Prime Minister who at her August 28th 2007 press conference stated: "We will make sure that the current right of entry laws stay".

Further it was demonstrated that industry had not been sufficiently consulted or included in the negotiation of the bill. This was expressed by, Mr Stephen, Director, National Workplace Relations, Australian Industry Group (Melbourne hearing)

> "We had high hopes that this particular bill would address some well-recognised problems with the legislation and deliver a more productive, flexible and fair workplace relations system. Unfortunately the bill fails to address that. It is extremely lopsided, in our view, it does not even attempt to strike a balance. It expands the entitlements of employees and unions in numerous areas, and employers issues of concern are not addressed at all".

Business SA had this to say in its written submission:

> "These proposed changes were not as a result of the Review Panel's recommendations but rather they are changes that the Government has formulated of its own motion.
>
> In fact, a number of these proposed amendments are changes that the trade union movement has been calling for, and such changes are simply enhancing the unions' power base and assisting them in the area of membership recruitment".

Family Friendly Measures

The Coalition Members are not opposed in principle to some of the clauses in the family friendly section and are disappointed they are included in the same bill as the clauses granting greater power to the unions thus guaranteeing the Coalition Members are not able to explore how they may have been made acceptable to all parties.

However the Coalition Members draw attention to the section proposing extensive consultation on roster changes. The members are of the opinion that proper consultation is what already happens in most workplaces and support such management, but are concerned that the possible monitoring of such operations should not become an impediment to operating an efficient workplace.

The South Australian Wine Industry Association Incorporated submission supported this view:

> "The wine industry cannot safely predict the exact time when grapes will be ready to be picked and need to be crushed, so there is a need in the industry to be able to change rosters and possibly introduce shifts within a short time frame. To impose the additional burden of further consultation with employees regarding changes in their regular rostered hours, which in turn creates further administration to maintain the evidence of consultation, creates barriers for wine industry employers who are striving to maintain competitiveness and efficiency".

Anti-Bullying Measure

The Coalition Members recognise that work place bullying is a real and damaging part of some workplaces. Mr Ramsey, Ms Andrews and Mr Tudge participated in the Education and Employment committee's extensive inquiry into this subject, 'Workplace Bullying, I Just Want it to Stop' and were moved in particular by the personal testaments from individuals who had suffered as a result of unresolved conflict in the workplace.

That report made 23 recommendations to government, however this bill picks up just one of those, recommendation 23, which calls for an unspecified individual right of recourse.

This was one of just a few recommendations the Coalition members dissented on and their views are encapsulated in this passage:

> "Further, the Coalition Members are concerned that enabling individuals to take such action will open the door to potential abuse of the device. Frivolous actions, or even worse, actions

> driven by malicious intent would have the ability to tie employers up in rolling court actions for extended periods".

Workplace Bullying is already addressed under the Workplace Health and Safety Act and the Coalition Members are concerned that this bill proposes an alternative forum for these issues to be pursued: This problem was highlighted in the National Farmers submission:

> "The NFF is of the view that the proposed amendments will encourage forum shopping, when the same subject matter is currently already dealt with under the umbrella of health and safety. We view this amendment as adding to the regulatory burden of time and resource poor farmers predominately running small to medium enterprises (SMEs)".

Modern Awards Objective and Right of Entry

At the heart of this bill is the proposal stipulating that if an employer and the union cannot agree on a suitable place for the representative to meet with union members, then the default option is any room or area in which employees take meal or other breaks and is provided by the employer for that purpose.

The Coalition Members are concerned that this clause delivers exactly the preferred option of the unions, that is access to the lunchroom, where the union official will ultimately come into contact with every other worker on the worksite and provide an opportunity for the official to pressure the worker to join the union.

The Australian Mines & Metals Association (submission) said:

> "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".

Further the bill proposes employers are responsible to supply transport to union officials to and from remote sites. The mining industry tells us that this may cost anywhere up to $30k in the case of an off shore oil rig and that the visiting officials are not trained or inducted to be in that space.

Summary

The Coalition Members are of the strong opinion that this bill has been put up for political purposes to further tilt the balance in the workplace towards the unions.

The Coalition Members believe the breadth of the amendments will impact on every workplace in Australia and as such the process of examination of the impact has been insufficient. This was supported by Mr Dick Grozier, Director, Industrial Relations, Australian Business Industrial, and Director, Workplace Policy, New South Wales Business Australia:

> "In case it is unclear, we remain of the view that the appropriate recommendation from this committee is that the bill not be proceeded with. In our view, it has been hastily drafted—and we think there are a number of signs of that in the bill, as we are adverted to in our written submissions. It has not been subject to an impact assessment, and we think that is a very important omission. It has not been subject to anything like proper consultation. In the main, where it draws upon or purports to draw upon recommendations either of the expert panel or of the House committee, the proposals are inconsistent with those recommendations. So it remains our view that the recommendation from this committee should be that the bill not be proceeded with."

In some cases the case for change is weak and contradicts earlier government commitments, particularly in the area of increased rights for entry, in others such as workplace bullying the concerns are genuine, but the Coalition Members believe the government's proposed solution cannot be fully justified.

The Coalition Members recommend that the bill not be passed.

Coalition Members

Rowan Ramsey MP (Deputy Chair) **Karen Andrews MP**

Nola Marino MP **Alan Tudge MP**