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**Australian Business
Industrial**

SUBMISSION

Re: Fair Work Amendment Bill 2013

The Standing Committee on Education and Employment

17 April 2013

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1. ABOUT ABI

- 1.1 ABI is registered under the *Fair Work (Registered Organisations) Act 2012* as an organisation of employers. ABI is the successor of the former Chamber of Manufactures of New South Wales.
- 1.2 ABI members are also members of the New South Wales Business Chamber and ABI is the industrial policy and representative affiliate of the New South Wales Business Chamber.

2. SUMMARY

- 2.1 Australian Business Industrial (ABI) thanks the Standing Committee on Education and Employment (Standing Committee) for the opportunity to comment on the *Fair Work Amendment Bill 2013* (Bill) which was tabled in the House on 21 March 2013. ABI notes that the Minister's speech has not yet been given and the second reading debate is yet to commence.
- 2.2 ABI does not support passage of the Bill and proposes that the Standing Committee recommend in this way.
- 2.3 The Bill purports to respond to recommendations of the Expert Panel which undertook a post-implementation review of the *Fair Work Act 2009*, and the recommendations of the Standing 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.
- 2.4 The Bill was assembled quickly with no consultation and little or no warning, and contains consequences which are possibly unintended and certainly not adverted to. Except for its technical provisions the Bill requires an impact assessment from which it has been exempted.
- 2.5 In the event that the Standing Committee is not inclined to recommend the Bill not be enacted ABI proposes that in framing its recommendation the Standing Committee have regard to the actual recommendations of the report of the Expert Panel and the House Standing Committee.
- 2.6 Schedules 5, Functions of the FWC, and 6, Technical amendments, are technical and do not seem to require an impact assessment. Schedule 5 appears unnecessary, and there is really no need for its enactment. Schedule 6 makes minor corrections which should be made. The Committee could recommend its passage, or the schedule could go to the next statute law revision bill.

3. INTRODUCTION

- 3.1 The Bill is the second significant set of proposed amendments to the *Fair Work Act 2009* (FW Act). It follows the *Fair Work Amendment Act 2012* which was enacted late last year and mainly commenced on 1 January 2013.
- 3.2 Together with some notable additions the *Fair Work Amendment Act 2012* gave effect to a number of the recommendations in the report of the Expert Panel (the Panel) which reviewed the operation of the *Fair Work Act 2009* (FW Act) in 2012, “Towards more productive and equitable workplaces”. The review was necessary because the *Fair Work Bill 2008* had not been assessed by the Office of Best Practice Regulation prior to coming to Parliament. That bill had received a Prime Ministerial exemption and therefore a post-implementation review was required.
- 3.3 The post-implementation review assessed the effectiveness and efficiency with which the FW Act met its policy objectives. In his second reading speech for the *Fair Work Amendment Bill 2012* the Minister said
- The panel's report was approved by the Office of Best Practice Regulation. The panel concluded that the Fair Work Act is working well and is meeting its objectives, and the economic outcomes under the Fair Work Act have been favourable to Australia's continuing prosperity.*¹
- 3.4 The Minister drew attention to his consultation with stakeholders in arriving at which of the Panel’s recommendations the Bill would give effect to. He said
- It has become obvious from these consultations that there is broad support for around a third of the recommendations. These recommendations are reflected in the bill I am introducing today. I will continue to work with stakeholders on the remaining recommendations, with a view to introducing further legislation in the new year.*²
- 3.5 To the best of ABI’s understanding there has been no significant consultation with the social partners about the Panel’s remaining recommendations since the 2012 bill. Certainly employers were not consulted about the Panel’s remaining recommendations nor were they consulted about the sorts of further amendments to the FW Act the Government was contemplating.
- 3.6 Rather, following the Prime Minister’s announcement that the federal election would be held on 14 September 2013, the fact and content of a second bill to amend the FW Act were advised in a series of press releases, interviews or speeches.
- 3.7 On 10 February the Prime Minister said in an interview that the Government would be announcing the second tranche of FW changes partly in the following week and partly later.³ The Prime Minister said that the coming week would be focused on work and family life and foreshadowed expanding the right to request to include a right to ask for flexible and part-time work when returning from parental leave and a right to be consulted about roster changes.
- 3.8 On 11 February the Minister announced amendments to the FW Act which would expand the right to request under the national Employment Standards to employees with caring

¹ P 12578, Hansard, 30 October 2012

² P 12578, Hansard, 30 October 2012

³ <http://www.pm.gov.au/press-office/transcript-doorstop-interview-12>

responsibilities, school age children or a disability, mature age employees and employees associated with family violence.⁴

- 3.9 On 12 February 2013 the Minister announced that new anti-bullying provisions would be inserted into the FW Act giving victims the right to lodge a complaint and requiring the FW Commission to commence the matter within 14 days.
- 3.10 On 13 February 2013 the Minister announced amendments to the FW Act to provide greater support for employees who are parents, primarily by expanding access to unpaid parental leave in a number of ways.⁵
- 3.11 On 14 February 2013 the Minister announced that the FW Act would be amended to require awards and agreements to provide that there must be consultation where an employer seeks to change working hours or rosters.⁶
- 3.12 On 8 March 2013, following a 7 March meeting with representatives of employers and employees to outline the proposed changes, the Minister announced that the FW Act would be amended to give the FW Commission greater powers in right of entry disputes and allow union officials to use lunch areas for discussions or interviews with eligible employees and to impose good faith bargaining requirements on greenfields bargaining and to provide greater access to arbitration for greenfields and other intractable disputes.⁷
- 3.13 On 14 March the Prime Minister announced that the FW Act would be amended to ensure that penalty rates, overtime, shift loadings and public holiday pay are to be formally considered by the FW Commission when it makes or varies awards.⁸

Impact statements

- 3.14 These announcements all propose amendments to the FW Act which impact businesses and the not-for-profit sector. The announced proposed changes are neither minor nor machinery. They require a regulatory impact assessment to be undertaken by the Office of Best Practice Regulation unless the Prime Minister agrees there are exceptional circumstances.
- 3.15 On 22 February the Office of Best Practice Regulation posted that the proposed bargaining amendments to the FW Act advised by the Minister on 11, 12, 13 and 14 February had been granted a Prime Ministerial exemption on the basis of exceptional circumstances.⁹
- 3.16 On 22 March the Office of Best Practice Regulation posted that the proposed bargaining amendments to the FW Act advised by the Minister on 8 March and the proposed penalty rates amendments announced by the Prime Minister on 14 March had been granted a Prime Ministerial exemption on the basis of exceptional circumstances.¹⁰

⁴ <http://ministers.deewr.gov.au/shorten/expanding-right-request-flexible-work-arrangements-help-modern-australian-families-0>

⁵ <http://ministers.deewr.gov.au/shorten/helping-australian-mums-and-dads-improved-parental-leave-and-protections-pregnant-workers>

⁶ <http://ministers.deewr.gov.au/shorten/modern-families-central-fair-work-act-improvements>

⁷ <http://ministers.deewr.gov.au/shorten/gillard-government-further-enhance-fair-work-act>

⁸ <http://www.pm.gov.au/press-office/address-actu-community-summit-creating-secure-jobs-and-better-society>

⁹ <http://ris.finance.gov.au/2013/02/28/prime-ministers-exemption-fair-work-act/>

¹⁰ <http://ris.finance.gov.au/2013/03/22/prime-ministers-exemption-amendments/>

- 3.17 The Government has not proceeded with the announced bargaining amendments. This decision is welcome, but the decision to not proceed should not give rise to the inference that the schedules which remain in the Bill are necessarily appropriate, or more appropriate and balanced than the proposed schedule which was not proceeded with nor does it address the absence of consultation. The decision to not proceed with the proposed bargaining amendments does not address the absence of regulatory impact assessment.

Productivity enhancing policy interventions

- 3.18 In conjunction with the NSW Business Chamber, ABI commissioned research with the objective of identifying the key influences on the national productivity performance and assessing how the fair work system contributes to productivity performance and efforts to improve it. The report, “*Productivity and Fair Work*”, was issued in April 2012. It sought to examine the drivers of national productivity improvement and the extent to which the fair work system supported or detracted from what was needed.
- 3.19 The study adopted the Productivity Commission’s framework for developing and reviewing policies to lift productivity performance. The Productivity Commission identifies three planks which are the touchstones for policy and institutional settings – incentives, flexibility and capabilities.¹¹
- 3.20 The researchers conducted in depth interviews with just under 70 senior managers and external experts and undertook a significant literature review.¹²
- 3.21 Following the examination of productivity drivers the researchers concluded
- Increasingly, business improvement comes about through constant analysis of market opportunities and working with where key competencies lie to capture value. Supply chains, organisational structures and production processes can then be adapted to not only capture value but also meet market demands in efficient, competitive ways.*¹³
- 3.22 The second part of the study also addressed the need for enterprises to be market focussed and to be nimble in the context of the relentless pressure of competition. In the discussion about decision fatigue, the researchers observed
- Interviewees were of the view that the Fair Work system of regulating workplace relations puts an implementation and compliance overhead on businesses that resulted in a great deal of cost for little gain. Even if they conceded the good intentions of the regulation, businesses in this study experienced it as cumbersome at least, and in some parts quite ‘heavy handed’ indeed. Interviewees did not see the Fair Work system as even coming close to providing a return on the investment employers must make on compliance, nor recognising past positive investments made in employee engagement and positive workplace practices. The effort expended on compliance with the Fair Work system was seen as an unfortunate diversion of significant productive effort away from other business initiatives and workplace changes that would have better served business and productivity improvement.*¹⁴

¹¹ P 36, *Productivity and Fair Work*, Australian Business Foundation, April 2012

¹² P 18, *Productivity and Fair Work*, Australian Business Foundation, April 2012

¹³ P 37, *Productivity and Fair Work*, Australian Business Foundation, April 2012

¹⁴ P 43, *Productivity and Fair Work*, Australian Business Foundation, April 2012

- 3.23 This finding needs to be understood in context – it is not a call for wholesale change. As the researchers reported

*Overwhelmingly, businesses of all shapes and sizes have told the research team that their enterprise cannot bear the uncertainty of, and cost compliance with, further substantial changes to the system. That is not what they are advocating. Some selective amendments would, however, enhance the system (despite some of the flawed assumptions in its design) ...*¹⁵

- 3.24 The very strong message is that the complexity of dealing with existing Fair Work compliance obligations is a serious drain on the enterprise. The Fair Work regime needs to be lightened, better accommodate differences and not made even more distracting and onerous by the addition of further new compliance obligations. They are not costless.

¹⁵ P 52, *Productivity and Fair Work*, Australian Business Foundation, April 2012

4. SCHEDULE 1 – FAMILY FRIENDLY MEASURES

- 4.1 As advised by the various announcements there is a range of “family friendly measures” proposed by Schedule 1 and the schedule contains five parts. Although not all of the proposed changes are equally intrusive, collectively the content of Schedule 1 will add significantly to the difficulties faced by employers and make even more complicated and time consuming managing the business, making and implementing decisions and paying attention to the non-staff related matters affecting the enterprise.
- 4.2 For this reason and because of the 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, and indeed, the remainder of the Bill would be very different as well.
- 4.3 Should the Standing Committee not be minded to make that recommendation, ABI recommends that it should be guided by the recommendations of the Panel to determine what parts of the schedule it might support. This means that the recommendations about what should be enacted should address the balance of proposed amendments as well.

Part 1 – Special maternity leave

- 4.4 The National Employment Standards (NES) provide that women with at least 12 months’ service at the expected birth date of the child are eligible for unpaid maternity leave. Under the NES an eligible employee with a pregnancy related illness who does not take personal/carer’s leave is eligible to take special maternity leave for the period of the illness. The period of special maternity leave taken is deducted from the employee’s (and partner’s) total entitlement to unpaid parental leave.
- 4.5 Part 1 proposes to amend the FW Act so that any special maternity leave taken by a pregnant employee is not deducted from her entitlement to unpaid maternity leave (or her partner’s entitlement to unpaid parental leave).
- 4.6 The Panel recommended repealing the rule that special maternity leave be deducted from the total available unpaid parental leave.¹⁶
- 4.7 ABI accepts that most women taking unpaid maternity¹⁷ leave do not access special maternity leave. On the other hand the proposed amendment is not without an impact. If enacted it would increase the length of time that affected women are out of the workforce.
- 4.8 Although unpaid, NES parental leave imposes both monetary costs and administrative burdens on enterprises. Economic costs and costs of time arise from covering the employee’s absence (whether by finding and inducting a replacement employee, redistributing the work, using overtime or some combination of means); managing the expectations of replacement and relocated employee(s); and the loss of the absent employee’s currency. Staff movement decisions, managing expectations and loss of currency become more difficult the longer the employee is away. Mothers on unpaid

¹⁶ P 95, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

¹⁷ P ix, *Paid Parental Leave evaluation: Phase 1*, B Martin et al, Occasional Paper No. 44, FACSIA, 2012. This reports a study (the Baseline Mothers Study (BaMS) survey which tracked births registered in 2009) intended to set the baseline so as to evaluate the impact of the National Paid Parental Leave scheme on the time mothers take from work following the birth of a child. It found that 81% of mothers utilised unpaid parental leave as did 45% of fathers.

parental leave also access the National Paid Parental Leave Scheme making the employer the paymaster and bringing its own additional administrative load.

- 4.9 Eligible employees are entitled to up to 12 months' unpaid parental leave, less any unpaid parental leave accessed by a partner, with a right to request up to an additional 12 months' unpaid parental leave which can only be refused on reasonable business grounds.
- 4.10 ABI is unaware of any figures which show the effect of special maternity leave, or pregnancy related illness necessitating personal/carer's leave, on the length of unpaid parental leave taken, but a reasonable proportion of mothers do not return to work until at least 9 months after the birth of the child¹⁸. (Unpaid maternity leave must be started at least 6 weeks before the birth of the child, and partners can access both concurrent unpaid parental leave and sequential parental leave.)
- 4.11 While the costs of this proposed amendment are confined to the minority of pregnancies it should not be thought that the proposed change is costless.

Part 2 – Parental leave

- 4.12 Under the NES concurrent parental leave is available to a partner from and until 3 weeks after the birth or placement of the child.
- 4.13 Part 2 of Schedule 1 proposes to provide up to 8 weeks' concurrent parental leave, accessible from the birth or placement of the child, which can be taken in a block or in periods of at least 2 weeks. The employee must give 10 weeks' notice for the first period and 4 weeks' notice for any subsequent period, unless that is not practicable. Under the amendment concurrent unpaid parental leave would be available during any part of the partner employee's unpaid parental leave following the birth or placement of the child.
- 4.14 The Panel made no recommendation of any kind about concurrent unpaid parental leave.
- 4.15 As well as imposing more staffing and administrative difficulties the proposed amendment seems to have unintended consequences.
- 4.16 Where an employee wished to access periods of concurrent leave the second and any subsequent period is not dissimilar to annual leave. Annual leave is taken at an agreed time but the employer must not unreasonably refuse a request for annual leave. Where there is disagreement between the employer and employee it is almost always about the timing or duration of the leave. Under the NES there is no statutory notice period for requesting annual leave but often there is a minimum notice period, particularly for longer periods of leave, and, even if not, the period of notice is a factor determining reasonableness.
- 4.17 Typically paid annual leave is taken with concurrent unpaid parental leave. Under the concurrent unpaid parental leave provisions the employer does not have any right to not agree to a proposed period of leave. Subject to the four week notice requirement an eligible employee has the right to determine periods of leave, which in many cases also means the right to determine the timing of paid annual leave, depriving the employer of the capacity to refuse annual leave which is not reasonable for the business.

¹⁸ P 45, Fig 3, *Paid Parental Leave evaluation: Phase 1*, B Martin et al, Occasional Paper No. 44, FACSIA, 2012. 21% of mothers returned to work between 9 and 14 months after the birth of the child and a further 29% were still on leave (most of whom will probably not return) 13 months after their child's birth.

Part 3 – Right to request flexible working arrangements

- 4.18 Under the NES an eligible employee has the right to request a change in working arrangements to assist the employee to care for a child. An eligible employee is a parent of, or has responsibility for the care of, a child who is under school age (or under 18 if the child has a disability) and has at least 12 months' service with the employer. The employee's request must be made in writing and identify the proposed change and the reasons for it.
- 4.19 Employees are not required to identify how they think their request can be accommodated by the business in their written application.
- 4.20 The employer must formally respond within 21 days, and unless the employer is granting the request as proposed must do so in writing outlining the reasons for not doing so. This is so whether the request has been wholly turned down or the employer and employee have agreed an arrangement which differs from the employee's original request. A request can only be refused on reasonable business grounds.
- 4.21 Employers do try to meet employees' requests for changed arrangements to better fit their individual circumstances and there are many arrangements, often informal, operating.¹⁹ However not all work requirements are equally open to all types of flexibility. For example, shift systems or work team arrangements are not generally open to individual hours flexibility or changed work locations. There is often a need for service industries to staff at different levels at different times to meet customer/client needs which reduces the capacity to play around with employees' hours.
- 4.22 Most organisations have limits to their capacity to reorganise working patterns as the number of employees under special arrangements increases. Later requests are often more difficult to accommodate than previous ones. This in itself can be a significant management issue. As well, many employees understand the right to request as a right to alter. Because of this smaller members in particular find the formal right to request process difficult and confronting and are unsure where their rights lie.
- 4.23 Part 3 proposes to amend the current NES provisions in several significant ways. It significantly expands the circumstances which can give rise to the right to request. Most employees with 12 months' service will be eligible for at least a fair proportion of their working lives. This is dealt with below.
- 4.24 The wording of the amendment, that an eligible employee who "...would like to change his or her working arrangements because of those [eligibility] circumstances" may apply in writing for their working arrangements to be changed, is problematical. This new wording, possibly intended to cover the expanded range of eligibility circumstances, will reinforce the perception that the right to request is an employee right to change.
- 4.25 Nothing of this kind was recommended by the Panel.
- 4.26 Part 3 expands eligibility to parents of and employees responsible for the care of a school aged child and employees who are carers within the scope of the *Carer Recognition Act 2010*. This act applies to those who provide personal care, support and assistance to someone who has a disability, a medical condition or mental illness, or who is frail or aged.

¹⁹ See also Pp 96 and 98, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

The act's definition of carer retains and expands coverage of employees responsible for the care of a child with a disability.

- 4.27 The Panel recommended expansion of those eligible to request flexible working arrangements to "...a wider range of caring and other circumstances"²⁰. The Panel appears to have been persuaded in part by evidence of the fact that employers do try to meet employee requests.
- 4.28 Part 3 also proposes to expand access to the right to request to employees with a disability, employees 55 and over and employees experiencing violence from a member of his or her family, or providing support to a family or household member experiencing violence from a family member. With the exception of employees aged 55 or over, these other potential reasons for a right to request were adverted in the Panel's report as proposals made in different submissions, but it drew no formal conclusions about them.
- 4.29 Apart from the fact that many of these proposals were made in various of the submissions to the Panel, it is difficult to see the policy reasons for these proposed additions to eligibility. In the case of employees with a disability it is difficult to understand what defect in the *Disability Discrimination Act 1992* is being addressed, and nor is there evidence that employers do not accommodate employee with a disability.
- 4.30 In the case of employees who are the victim of family violence the main work-related impact is likely to be unpredictable events affecting attendance, rather than a need for an ongoing alteration of regular patterns of work. The genesis of this idea seems to be a report of the Law Reform Commission addressing a consistent systemic approach to domestic violence across the cannon of Commonwealth law. There is no compelling evidence that when employers are aware of an employee's exposure to domestic violence they do not seek to work with and assist the employee as they can.
- 4.31 Again there is no evidence of the need to provide a formal right to request to mature aged employees. It is also difficult to understand the basis for selecting 55 as the proposed point for eligibility and there is no indication in the explanatory memorandum why that should be it. There is no obvious trigger. For example, under superannuation law an employee cannot access a tax free transition to retirement income stream until age 60.
- 4.32 Proposed s 65(1B) provides that a parent returning from unpaid parental leave can request to return on a part-time basis. It is unnecessary.
- 4.33 Part 3 also inserts a definition of "reasonable business grounds". This is a direct reversal of the Panel's recommendation on this matter

The Panel was not persuaded by arguments that a definition of 'reasonable business grounds' for refusing a request for flexible working arrangements should be included in the legislation. We note the Government's clear decision that 'the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made'. The EM further provides examples of what reasonable grounds may be and notes that 'it is envisaged the FWA would provide guidance on the issue.' While the Panel is not certain that the interpretation of reasonable business grounds has been unreasonable or out of

²⁰ P 99, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

*alignment with the Government's intention, it may be appropriate for FWA to provide further guidance on the issue if it emerges as an issue.*²¹

4.34 Proposed s 65(5A) provides that reasonable business grounds for declining or modifying a request for changed working arrangements are circumstances such as where the request

- Is too costly to implement;
- Requires altering other employees' working arrangements in ways which cannot be achieved;
- Requires changes to other employees' arrangements or recruitment of a new employee which are impracticable;
- Would result in a significant loss in inefficiency or productivity or significantly impact negatively on customer service.

4.35 This is not an exhaustive list but it sets the bar for determining when reasonable business grounds arise. It also sets the bar for understanding its own prescribed examples. For example, something which is too costly to implement must impose costs at a level which is commensurate with not being able to do what is requested or taking a significant hit to productivity, efficiency or customer service. The very idea that reasonable business grounds do not arise until significant damage is being done to the business is outrageous.

4.36 Proposed s 65(5A) is also directly inconsistent with object 3(a) of the FW Act

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

- (a) *providing workplace relations laws which are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take account of Australia's international labour obligations; ...*

4.37 Although proposed s 65(5A) defines reasonable business grounds in the context of requests for flexible working arrangements, "reasonable business grounds" are also the basis upon which requests for additional unpaid parental leave (after 12 months) are determined.

Part 4 – Consultations about changes to rosters or working hours

4.38 Part 4 proposes to insert new provisions requiring awards and agreements to contain provisions requiring an employer to consult employees over changes to their ordinary hours of work or their regular roster. In the case of awards the FW Commission would have to vary awards prior to the end of the year with effect from 1 January 2014. In the case of agreements the requirement would apply to agreements which are made from proclamation or 6 months after Assent.

4.39 The award term would also have to allow for representation in the consultations. Although this latter requirement is absent from the proposed amendments affecting enterprise agreements, approval requires that the FW Commission is satisfied that the agreement meets the better off overall test (BOOT) for each employee. The "value" of formal access

²¹ p 99, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

to representation is not easily quantifiable, and so its formal absence from an agreement's consultation provision will weigh heavily.

- 4.40 This proposed amendment does not reflect any Panel recommendation – or discussion in its review report.
- 4.41 Perhaps an unintended consequence of putting the Bill together, and another technical annoyance in the system, but agreements made after this time (proclamation or 6 months after Assent) will face a different BOOT than those coming for approval from 1 January 2014 (even though they may have been negotiated and made prior to the relevant award being varied).
- 4.42 The proposed amendment appears based on an unspoken assumption that employers cannot be trusted. Employers do consult about rostering and hours changes which affect employees. Part of doing well is having employees who are positive about their enterprise and motivated. Regulating because something is already done is not a good reason to legislate and it is certainly not true that if it's already being done there are no compliance costs to regulating. Compliance requires technical compliance and those technical requirements will not usually sit equally well in all the circumstances where the policy object is already being achieved.
- 4.43 These proposed amendments demonstrate this well. The Bill also requires that the award or agreement terms requires the employer to provide information about the change to the employees, invite their views about the impact (including impact on their family or caring responsibilities), and to consider any views about the impact.
- 4.44 First and most obvious, despite the fact that Part 4 is located in Schedule 1 the proposed statutory consultation is not confined to family friendly measures or responsibilities.
- 4.45 Second, the question of when each of the procedural requirements has been complied with, what is enough and how it is demonstrated (including consideration of matters not related to family or caring responsibilities) is clearly open to manipulation in an industrially sensitive site.
- 4.46 Third, the amendments provide no lower threshold to what is a change to an employee's ordinary hours or regular roster. They clearly contemplate such a change involving a single employee. But, for example, what is the employee's regular roster? The explanatory memorandum advises that where an 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 on these arrangements will trigger the consultation requirement in a modern award.²² This subjective test is highly susceptible of abuse.
- 4.47 Given the explanation of the test it is unclear how this requirement interacts with award casual provisions, and unclear about the point at which an employer can know the formal obligation is triggered.

Part 5 – Transfer to a safe job

- 4.48 Part 5 proposes to extend the current unpaid parental leave provisions about transfer to a safe job, or where that cannot be achieved, being sent home on (paid) no safe job leave which apply to eligible employees to those who are ineligible because they have not sufficient service with the employer. The distinction between an eligible employee and

²² P 20, Explanatory Memorandum

one who is not would remain because an ineligible employee, if sent on no safe job leave would not be entitled to pay.

- 4.49 Under the NES an eligible women is entitled, subject to the production of satisfactory evidence, to be transferred to an appropriate safe job. This is already a moral hazard in the FW Act because an appropriate safe job needs to require the same hours as the position from which the employee is being transferred. Different hours must be agreed. Where there is no appropriate safe job the employee is sent home on pay. This means that an employee cannot offer reduced hours so the employee undertakes a mix of work and paid leave, because reduced hours must be agreed. It is the reverse of good practice in workers' compensation.
- 4.50 It is difficult to see the policy rationale for this amendment. It is clearly burdensome on employers, but it does not seem to add any positive health and safety nor job security outcomes.
- 4.51 Part 5 creates a situation where an employee who is fit for work but not her current position but who doesn't have the right of return to her former position because of her pregnancy (which is the fundamental purpose and effect of the unpaid parental leave provisions for eligible employees), the employer would be required to make temporary accommodating arrangements for her absence because the employee might be able to come back at some time between taking the leave and when she gives birth because the risk period might end.
- 4.52 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 the relevant health and safety legislation mean that they must avoid exposing the pregnant employee to work which presents risks to her or her unborn baby.
- 4.53 The proposed amendment also changes the status of consultation provisions in modern awards. Currently, under s 139 FW Act a modern award may contain terms about procedures for consultation, representation and dispute settlement. The amendments would make the consultation provision mandatory, at least to the extent that it satisfies the proposed requirement.

5. SCHEDULE 2 – THE MODERN AWARDS OBJECTIVE

- 5.1 Schedule 2 of the Bill proposes to insert a new paragraph 134(1)(da) into the modern awards objective which would require the FW Commission to take account of “...the need to provide additional remuneration to employees working...” overtime, unsocial, irregular or unpredictable hours, weekends, public holidays or on shifts. By chance or design, the proposed paragraph would follow the current requirement that the FW Commission take account of “...the need to promote flexible modern work practices and the efficient and productive performance of work”. This is probably an unintended consequence of the proposed amendment but it does rather give statutory context to the pursuit of productivity and efficiency.
- 5.2 It is important that the effect of the proposed new paragraph not be underestimated. Proposed para 134(1)(da) is not merely a robust affirmation of the status quo. It is a significant addition to the current modern awards objective which is to be imposed on the system of modern awards as they have been reviewed (as required under the *Fair Work (Transitional and Consequential Provisions) Act 2009* (the two-year review)) and varied so as to remedy any issue about not achieving the modern awards objective.
- 5.3 Proposed para 134(1)(da) does not just save existing penalties, it imposes a new requirement on the FW Commission to consider introducing “additional remuneration” into modern awards which do not currently provide such remuneration and also to consider the adequacy of existing award provisions which currently do so.
- 5.4 Modern awards were made under Part 10A of the *Workplace Relations Act 1996* as amended by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. The award modernisation process was both triggered and shaped by the (then) Minister’s request. Proposed para 134(1)(da) is a new requirement imposed after modernisation and after the two-year review.
- 5.5 Some idea of how far this departs from the modernisation and review process is demonstrated from the request which provided
- 27A. The Commission should create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and in the industry’s core trading times.*²³
- 5.6 Indeed, the extent of change embodied in the proposed new para 134(1)(da) is demonstrated by its timing. If enacted, the new objective would not come into effect until 1 January 2014 following the completion of the two-year review. 1 January 2014 is the start date for the statutory four-year review provided under the *Fair Work Act 2009*. Were proposed para 134(1)(da) to come into effect from Assent, that is, were it to come into effect during the final phases of the two-year review, all those modern awards which had been reviewed would need to be re-opened and re-assessed against this new objective.

²³ Para 27A, Request under s 576C(1) – Award Modernisation – Consolidated Version (as at 9 November 2009) found at http://www.airc.gov.au/awardmod/download/request_cons_121109.pdf

- 5.7 The “additional remuneration” which the FW Commission would need to consider under proposed para 134(1)(da) could be construed as meaning remuneration in addition to that already provided by the award, although this is probably not its intended meaning. The Explanatory Memorandum is perfunctory and does not assist. It seems more likely that “additional remuneration” is intended to mean remuneration in addition to that prescribed for work which is undertaken in “ordinary hours” (that is, in addition to the pay for work which is not of a type or time captured by proposed sub-paragraphs (i) – (iv) of para 134(1)(da)).
- 5.8 The “need to provide” is a very strongly expressed requirement. It would be disingenuous to claim that phrasing what the FW Commission must take into account when ensuring a fair and relevant safety net as “...the need to provide additional remuneration...” merely replicates the phrasing of other paragraphs of the modern awards objective. Those other paragraphs which require an identified “need” to be taken into account (134(1)(b), (c), (d) and (g)) all address system objectives for modern awards, proposed para 134(1)(da) addresses specific conditions of employment.
- 5.9 The proposed new modern awards objective seems likely to have all sorts of consequences which are not immediately obvious and for which there has not been time to tease out. It may be that many of the less obvious consequences are unintended, but they are yet to be discussed and thought through.
- 5.10 For example, a number of modern awards provide that a part-time employee may work hours in addition to his or her regular part-time hours by agreement at the ordinary rate of pay, provided that the additional hours do not fall outside the award’s span of hours or the total does not exceed 38. It is quite a widespread practice, particularly in regional areas, where there are many small businesses which experience fluctuating work demands, for employees to approach the boss for extra work when they need more money and if the boss is able to provide it, the work is undertaken at ordinary rates. This additional work is often found work, such as tidying up, rather than the employee’s main job. These arrangements seem threatened by the new modern awards objective, because the enabling award clauses seem threatened.
- 5.11 None of this is intended to suggest that the FW Commission would not be able to understand the impact of changes of this kind, but the Commission is established under the Act and its decisions and variations are subject to its statutory obligations under the Act. As identified above at 5.4, this proposed addition to the modern awards objective is imposed on awards which have been varied to remedy any issues they might have had with achieving the modern awards objective in its current form.
- 5.12 The Panel neither recommended nor discussed deficiencies of this kind in the modern awards objective.

Legislating penalties

- 5.13 The question of changing penalty rates has been the subject of some consideration in the Senate. The Senate Education, Employment and Workplace Relations Legislation Committee (Senate Committee) tabled its report into the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* on 8 March 2013. In its investigation of that bill the majority found that

*Current penalty rates, as specified in modern awards, largely reflect state awards which were in place prior to award modernisation. They are not a new entitlement, nor do they represent a significant departure from earlier award protections.*²⁴

- 5.14 Although a dissenting report was written, the Senate Committee recommended that the Bill not be passed and the majority report noted that:

*Many submitters considered the bill to be ill-conceived as a matter of public policy given the overall framework of workplace relations law and an inappropriate infringement on the jurisdiction of Fair Work Australia, an independent tribunal established by Parliament to oversee industrial matters such as the payment of penalty rates. [...]*²⁵

- 5.15 The majority report drew attention to the ACTU's position and said:

The ACTU also reminded the committee that FWA was in the process of conducting a 2-year review of modern awards, and that:

*As part of the current 2-yearly review, FWA has convened a Full Bench to consider 24 separate applications which seek to make variations to penalty rate provisions in 7 modern awards, including awards which would be covered by the Bill. Of those 24 applications, a number seek to remove or reduce penalty rates under various modern awards. Those applications will be heard, consistent with the aims and objects of the FW Act and the modern awards objective. In addition to the 2-yearly review, the Fair Work Act 2009 also requires that modern awards be reviewed every 4 years. Consistent with the scheme of the FW Act, these reviews are the only appropriate forum for considering any reduction in the safety net.*²⁶

- 5.16 The Coalition Senators supported the recommendation that the Bill not be passed and strongly supported the view that the Bill dealt with matters which were matters for the Tribunal rather than the legislature. Neither the ACTU nor the Coalition suggested that the framework for considering modern awards was itself inadequate to an appropriate outcome, and nor was there any indication in the majority report that the modern awards objective was in some way deficient for protecting employees under modern awards from inappropriate changes to the safety net.

²⁴ Para 2.72, Report into the Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 (Report), Senate Education, Employment and Workplace Relations Legislation Committee

²⁵ Para 2.48, Report

²⁶ Para 2.50, Report

6. SCHEDULE 3 – ANTI-BULLYING MEASURE

- 6.1 Bullying in the workplace is totally unacceptable, as is bullying in other areas of public, or, indeed private, life. Nonetheless, bullying does take place, and takes place too frequently. The ultimate solution is that bullying behaviour is both recognisable and culturally unacceptable. That goal is clearly some way off.
- 6.2 Schedule 3 proposes to insert a new Part 6-4B, “Workers Bullied at Work”, which would allow a worker who is bullied at work to apply to the FW Commission for an order to stop the bullying. Proposed Part 6-4B is characterised as part of the Government’s response to *Workplace bullying “We just want it to stop”*, the report of the Standing Committee which was tabled on 26 November 2012.²⁷ Although the incidence and costs of bullying are very difficult to quantify, it is clear that there is a problem with and costs to bullying, and also that many people do not know how to respond to perceived or alleged bullying.²⁸
- 6.3 The schedule expressly brings bullying into the industrial tribunal’s jurisdiction which is a first and is a momentous change. It also brings a much wider coverage than employees, who, with limited exception, have been the jurisdictional basis of the industrial tribunal. It puts resolution, or more accurately part resolution, of health and safety matters into the tribunal where organisations have the primary access.
- 6.4 It is not explained why this is a good idea for developing sensitive and effective responses to bullying situations.
- 6.5 Schedule 3 of the Bill is not an appropriate response to the Standing Committee’s recommendations. It has been hastily drafted and drafted without adequate consultation. Consultation is particularly important in this matter, it necessary for maximising the chances of developing the best possible approach, with fewest negative consequences, and for achieving co-ordination and buy-in from the various stakeholders whose support is required to best achieve the reduction in and eradication of bullying.
- 6.6 In contrast the Standing Committee recognised the need to involve the stakeholders in its report. It seems noteworthy that the Standing Committee’s majority made 23 recommendations, only three of which do not explicitly refer to collaboration, and one of these (Recommendation 8) addresses the Commonwealth’s own employees.
- 6.7 Perhaps the most obvious indicator of the haste with which Schedule 3 has been drafted and the absence of consultation prior to and during its drafting is the coverage of the proposed new Part 6-4B. Although proposed Part 6-4B would cover a “worker” and “a person conducting a business or undertaking” (PCBU) as defined under the *Work Health and Safety Act 2011* (and its equivalents), and wide application is obviously intended, proposed s 789FD(1) confines the Part to PCBUs which are “constitutionally covered”. This is the same coverage as the *Workplace Relations Amendment (Work Choices) Act 2005*. PCBUs regulated by state jurisdictions, as well as PCBUs which are non-constitutional corporations which were referred into the national system for workplace relations purposes will not be covered.

²⁷ Para 86, Explanatory Memorandum

²⁸ Chapter 1, *Workplace Bullying “We just want it to stop”*, House Standing Committee on Education and Employment, October 2012

6.8 This is not only a problem raised by a failure to properly consult it is also indicative of the problem of mixing industrial with work health and safety matters. States have generally chosen to refer their remaining industrial jurisdiction to the Commonwealth, subject to conditions, including conditions about changing the legislation whereas states have retained jurisdiction over work health and safety and have generally agreed to common legislation. Where there is harmonised health and safety legislation there is full coverage of PCBUs and workers, where there is state specific legislation its coverage will be wider than employees and will not be restricted to constitutionally-covered employers.

A consistent approach to bullying

6.9 Apart from proper, nationally consistent coverage there is a need for a consistent definition of bullying.

6.10 One of the key issues in trying to give a dimension to the incidence of bullying is where the line should be drawn between human diversity and unacceptable conduct. Determining where the line should be drawn is also a key factor for improving peoples' understanding of how to respond to bullying so that there is reasonable consistency. Importantly, so far as is practicable, there must be consistency where statutory obligations and processes are called into play.

6.11 The Standing Committee reported

*A nationally consistent definition of workplace bullying across Australia that secures the rights of all Australian workers to be safe from bullying was almost universally supported in evidence to the inquiry.*²⁹

6.12 As a result the Standing Committee recommended

*The Committee recommends that the Commonwealth Government promote national adoption of the following definition: workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.*³⁰

6.13 However Safe Work Australia's draft model Code of Practice addressing workplace bullying (*Code of Practice: Managing the Risk of Workplace Bullying*) has proved to be very contentious and is currently being revised following a public comment period. The Code is yet to come before the Select Council on Workplace Relations (Ministerial Council) for approval. At the time of writing the draft was not yet on the list of draft Codes to come before the Ministerial Council.³¹

6.14 Whilst the Bill's proposed definition of when a worker is bullied at work (proposed s 789FD(1) FW Act) contains the Standing Committee's recommended attributes: repetitious, unreasonable behaviour directed toward one or more workers, which constitutes a risk to health and safety, the Bill's definition is premature before there is adoption of a national definition and it is also premature before the Code's finalisation.

²⁹ Para 2.88, *Workplace Bullying "We just want it to stop"*, House Standing Committee on Education and Employment, October 2012

³⁰ Para 1.64, *Workplace Bullying "We just want it to stop"*, House Standing Committee on Education and Employment, October 2012

³¹ The list, viewed 9/04/13 is at <http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/model-cop/pages/model-cop#R>

The Approach to Bullying in Schedule 3

- 6.15 Proposed s 789FD(1) provides that a worker is bullied at work if one or more individuals repeatedly behave unreasonably towards that worker or a group including that worker and that unreasonable behaviour creates a risk to health and safety. While this seems a relatively objective test, in practice it will not be. Proposed s 789C(1) provides that a worker (by which is meant a worker, union, lawyer or agent) who reasonably believes that he or she has been bullied at work may apply to the FW Commission for an order to stop the bullying. It is inconceivable that in the context of an application of this kind that the FW Commission would dismiss an application on the basis that it was not reasonable for the worker to believe that he or she was being bullied at work without conducting an investigation which would at the very least involve the employer and in many cases, other staff.
- 6.16 The test that the behaviour complained of creates a risk to health and safety is even more subjective because the worker's feelings are evidence of the risk manifesting.
- 6.17 Applications will attract investigations as a matter of course. The only exception might be where a worker (or representative) applied for an order on the basis of a single act which the worker believed to be unreasonable. Even in this case it is highly likely that in the majority of cases the FW Commission would seek to investigate the incident to see what led up to it and in many cases would want to hear from the employer and perhaps others. The schedule proposes a wide range of potential orders and the FW Commission has a wide range of investigatory powers.
- 6.18 This problem is clearly shown by proposed s 789FD(2) which excludes from "bullied at work" "...reasonable management action carried out in a reasonable manner". Apart from the fact that there are a lot of reasonables in this exclusion it demonstrates the porosity of the objectivity of proposed s 789FD(1). The explanatory memorandum states about proposed s 798FD(2)
- [Persons running a business have rights to make appropriate decisions, including allocating work and to give] "...fair and constructive feedback on a worker's performance. These actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example) victimised or humiliated."*³²
- 6.19 In its report on the exposure draft of the *Human Rights and Anti-Discrimination Bill 2013* the Senate Legal and Constitutional Affairs Legislation Committee discussed that draft bill's definition of discrimination. Under the exposure draft bill "discrimination" was treating a person unfavourably (because of a protected attribute) and "unfavourable treatment" was defined as including "harassment" and "...other conduct which offends, insults or intimidates the other person". The majority report recommended excising the proposed subsection on the basis of the subjectivity it was introducing (as well as its incompatibility with freedom of speech).³³

³² Para 112, Explanatory Memorandum

³³ Para 4.2 – 4.22, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, Legal and Constitutional Affairs Legislation Committee, February 2013

An employer's capacity to manage the business

6.20 Chapter 3 discussed the difficulties faced by employers in coping with their obligations now and in the case of many of our members it brings significant stress and worry. They feel unable to both properly manage their employees and attend to their business, inhibited from acting because of concern about getting it wrong, anxious because they are not doing what the business needs and powerless to alter their situation. Larger members are frustrated about how difficult it is to do the right thing by the business, be fair to employees and recognise good employees. This encourages managers to become fatalistic, go with the flow and seek legal advice before they try anything out of the ordinary. More often, however, legal advice is sought because of problems brought to them.

6.21 For obvious reasons the Panel reviewing the FW Act did not address the issue of workplace health and safety. The Panel did briefly discuss the question of the general protections and employer capacity to manage. In that context the Panel was unimpressed with the evidence of the FW Act's general protections provisions intruding on capacity to manage and the Panel felt that problems of this kind would go away.

*The Panel has not seen any evidence of a judicial interpretation of the general protections which infringes unjustly on an employer's right to initiate performance management processes against an underperforming employee. With time, the Panel believes a body of jurisprudence regarding the general protections will develop, which should provide employers and employees with greater certainty about the range of behaviour prohibited by the general protections.*³⁴

6.22 Of course the number of formal applications made, let alone fully litigated, is not really the issue. It is the possibility of an unfair dismissal and/or general protections claim, and the difficulty and costs of defending one which is the issue. The risk of a possible claim being raised is a real source of management inhibition. The threat of being hauled off to the Commission or to court and the economic, social and personal costs it incurs underpins the "go away" money system operating under the dismissal and general protections provisions. The formal record of decided cases and of applications is merely the tip of the iceberg.

6.23 In its report the Panel quoted an extract from the Australian Retailers Association. It remains just as apposite today as it was when it was written more than a year ago

*[A] fear of initiating performance management processes for fear of being seen to infringe these provisions, and a lack of understanding about how to manage employee absenteeism in a manner that is fair to both the employee and the employer without leading to a claim in this area.*³⁵

Multiple actions

6.24 The proposed part 6-4B contains no barriers to multiple actions.

6.25 Proposed s 789FH provides that s 115 of the uniform *Work Health and Safety Act 2011* will not apply in the case of bullying complaints or actions brought under the FW Act. S 115 of the *Work Health and Safety Act 2011* precludes applications or complaints under that act if the application or complaint has already been already made under another law of the Commonwealth or a state and has not been withdrawn.

³⁴ P 234, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

³⁵ P 234 *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

- 6.26 Schedule 3 allows complaints to be brought to both the FW Commission and the state WHS regulator, simultaneously or serially, and it also allows complaints which have been dismissed by the health and safety regulator to be re-agitated before the FW Commission and vice versa.
- 6.27 The existing FW Act provisions against multiple remedies and multiple actions are confined. The restrictions apply only to employees (and outworkers under part 6-4A) so do not apply to the extended meanings of “worker”.
- 6.28 The FW Act’s provisions for precluding multiple actions are also confined to actions involving dismissals. Section 725 FW Act provides that in relation to dismissals a person cannot make an application of a kind provided under ss 726 – 732 if the person has made another application under one of these sections (including under another law of the Commonwealth or of a state or territory (s 732 FW Act)) and that application has not failed for want of jurisdiction or been withdrawn, and therefore does not cover applicants for anti-bullying orders.
- 6.29 Section 734 of the FW Act provides that conduct the subject of a general protections application cannot also be brought under an anti-discrimination law or vice versa unless the first complaint has been withdrawn or failed for jurisdiction. Schedule 3 has no similar provisions for applications for anti-bullying orders so both avenues remain available, as do applications under proposed Part 6-4B and the general protections provisions (simultaneously or serially).
- 6.30 The threat of applications under general protections and the proposed anti-bullying provisions is wider because employees involved in the investigation also have access to both. It is not unusual for someone who has been alleged to be a perpetrator to respond with his or her own allegations of being bullied.
- 6.31 It also seems that a worker who is dissatisfied with a workers’ compensation decision linked to a bullying-based claim might be in a position to to apply for an anti-bullying order from the FW Commission. Whilst it might not be common for orders directing that the worker not attend work for a period because of his or her injury, these applications will also involve the employer.

Remedy for victims

- 6.32 The Standing Committee’s report devoted considerable discussion to the question of access to individual remedies. Because of the perceived inadequacies of the existing laws which impact bullying, the majority recommended

*The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process.*³⁶

- 6.33 However, the Standing Committee did not recommend where that right of recourse might be located, but felt that it should operate at the civil level of proof and that the process

³⁶ P 190, Recommendation 23, *Workplace Bullying “We just want it to stop”*, House Standing Committee on Education and Employment, October 2012

provided for workers seeking remedies “...in relation to other workplace disputes under the *Fair Work Act* and anti-discrimination laws” might be suitable for adoption.³⁷

- 6.34 The Standing Committee also noted the observations of the General Manager, Fair Work Australia

*It is, however, unclear whether the functions of Fair Work Australia 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 change and the legal and constitutional capacity is only one of many factors that would need to be taken into account.*³⁸

Schedule 3 should not be enacted

- 6.35 ABI recommends that Schedule 3 not be enacted in its current form, nor enacted at present. ABI sees real dangers in placing the proposed individual remedy process in the workplace relations system.
- 6.36 To approach the recognition and elimination of bullying properly there should be agreement about a nationally consistent definition and approach to bullying and greater consultation with the states and territories and the social partners about appropriate processes and the appropriate ways to address accessible remedies for victims of bullying.
- 6.37 Careful attention needs to be placed on minimising the capacity for abuse and minimising the potential for the dysfunctional outcomes of Part 3-1 (General Protections) provisions to distort anti-bullying remedies.

³⁷ Paras 6.124 – 6.127, *Workplace Bullying “We just want it to stop”*, House Standing Committee on Education and Employment, October 2012

³⁸ Para 6.117, *Workplace Bullying “We just want it to stop”*, House Standing Committee on Education and Employment, October 2012

7. SCHEDULE 4 – RIGHT OF ENTRY

- 7.1 Schedule 4 proposes to amend the right of entry provisions. There are two broad types of amendment proposed. The first deals with entry to hold discussions generally and rights associated with this type of entry, particularly about location and frequency; the second deals with remote locations.

Remote locations

- 7.2 Some of the proposed amendments address entry by permit holders to hold discussions with members and employees eligible to be members in remote locations. ABI has no members directly affected by these provisions and therefore does not address these amendments in any detail.
- 7.3 ABI does, however, propose that the Standing Committee recommend against passage, because the proposed amendments are highly unbalanced. By way of illustration, the proposed amendments address entry in order to hold discussions and entry to investigate a suspected breach or for OHS investigation (which, depending on the nature of the suspected breach could require the permit holder's attendance on site) but they do not contemplate any alternative, such as access to these employees on their way into or back from the remote location, or at some staging point.
- 7.4 The Panel did not discuss access to remote locations and made no recommendation concerning this matter.

Location of discussions

- 7.5 The Panel recommended that the FW Act be amended to give the FW Commission greater power to resolve disputes about the location for interviews and discussions in a way that balances the union's right to represent and the employer's right to conduct business without undue inconvenience.³⁹
- 7.6 The proposed amendments give effect to this recommendation of the Panel in two ways.
- 7.7 First, two notes are systemically added to relevant provisions. The notes advise that the permit holder may become subject to a restriction on the permit if he or she misuses the rights under the particular section and, second, that a person must not refuse or unduly delay entry or intentionally hinder or obstruct the permit holder exercising rights under the particular section.
- 7.8 Second, the power of the FW Commission to hear disputes about the location of discussions has been removed. S 505(1) where that power currently lies is repealed by the proposed amendments and it is neither reinserted by the proposed replacement s 505, nor the proposed replacement s 492 which deals with the location for interviews and discussions.
- 7.9 Under the proposed amendment the FW Commission can no longer hear matters about appropriate locations for interviews or discussions and there is a series of reminders that hindrance or refusal is an offence.
- 7.10 The second way in which this part gives effect to the Panel's recommendation is to repeal and replace s 492 of the FW Act. S 492 currently provides that an

³⁹ Pp 195 – 197, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

- 7.11 The proposed replacement s 492 provides the permit holder must conduct for interviews or discussions in a location agreed with the occupier. If there is not agreement between the permit holder and the occupier (a matter which under the amendment the FW Commission can no longer deal with) the permit holder can conduct the interviews or hold discussions in the room where the employees he or she wants to talk to take their meal or crib breaks.
- 7.12 In other words the agreement of the employer against the right of the permit holder to use the lunch room, and hindrance or obstruction can be prosecuted.
- 7.13 The difficulty about making the lunch room the default right for the permit holder is that those employees who are not interested to, or actively do not want to, see the permit holder have no option unless they do not attend their lunch room.
- 7.14 Proposed new s 492A (which would continue to fall within the FW Commission's jurisdiction) retains the current approach that the occupier can request the permit holder take a proposed route to the location for interview or discussion, provided the selected route is reasonable. A selected route is not unreasonable merely because the permit holder doesn't agree with it.
- 7.15 The FW Act provides that a permit holder entering a site to hold discussions may do so to with those employees eligible to be members who wish to participate in those discussions (S 484(c)). Particularly where the lunch/crib room is small, "dissenting" employees' right to not wish to participate becomes fairly hollow.
- 7.16 The default right also does not take account of eating areas in small institutions such as aged care facilities where staff and inmates eat in the same place, or clubs where members and staff might both eat.

Frequency of visits

- 7.17 The Panel also recommended that the FW Commission be provided with greater power to resolve disputes about frequency of visits (which it found was an issue with visits to hold discussions) in a manner which balances the union's right to represent and the employer's right to conduct business without undue inconvenience.⁴⁰
- 7.18 Proposed s 505A provides explicit capacity for the FW Commission to deal with disputes over excessive frequency of site visits by a permit holder or permit holders from the same organisation. Proposed s 505A applies to visits to hold discussions or members, or those eligible to be members. The FW Commission can only make orders if satisfied that the excessively frequent visits requires "...unreasonable diversion of the occupier's critical resources."
- 7.19 ABI accepts that the cost of hosting a visit could be a factor in determining the reasonableness of a particular pattern of visits, but it is an inappropriate jurisdictional trigger. It also, for example, means that the proposed section ignores the views of employees whose lunch room is being used, about the frequency of visits. It also ignores the dynamics of particular workplaces where not all employees are equally receptive to unions or perhaps particular unions or their officials.

⁴⁰ Pp 193 – 195, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

Schedule 4 should not be enacted

- 7.20 The amendments proposed by Schedule 4 are wholly unbalanced and one sided. ABI proposes that the Standing Committee recommend against enactment of the schedule.
- 7.21 The Schedule 4 amendments do not reflect the Panel's recommendations where they are related to them and the others are unrelated to the Panel's findings. They have not been properly consulted nor evaluated.

8. SCHEDULE 5 – FUNCTIONS OF THE FWC

8.1 Items 1 and 2 of Schedule 5 of the Bill propose to add specific functions to those of the FW Commission consequential on two amending acts. Items 1 and 2 are not opposed, however, nor do they appear necessary. There is no suggestion that there is any statutory barrier to the FW Commission undertaking any of the functions which have been referred to it by either the *Fair Work Amendment (Transfer of Business) Act 2012* or the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*.

8.2 Item 3 proposes to insert a new s 576(2)(aa) which would mean that the FW Commission also has the function of “...promoting cooperative and productive workplace relations and preventing disputes”.

8.3 The Panel discussed productivity at 4.7, “*Encouraging a more productive workplace*”, of its report. It said

*In its consideration of the economic aspects of the FW Act the Panel concludes that since it has come into force important outcomes such as wages growth, industrial disputes, the responsiveness of wages to supply and demand, the rate of growth of employment and the flexibility of work patterns have been favourable to Australia’s continuing prosperity, as indeed they have been since the transition away from arbitration two decades ago. The exception has been productivity growth, which has been disappointing in the FW Act framework and in the two preceding frameworks over the last decade. As explained in this chapter, the Panel is not persuaded that the legislative framework for industrial relations accounts for this productivity slowdown.*⁴¹

8.4 Whilst ABI would differ with the Panel’s view about the contribution of the national workplace relations system to national productivity outcomes, it is clear that, in the Panel’s view, no amendment to the FW Act is needed to give effect to what it sees as the tribunal’s appropriate contribution to improving productivity outcomes. The recent activity by the FW Commission supports that view. The Panel also said

*A broader industry engagement role for FWA is discussed in Chapter 12. The Panel observes here, however, that there is ample warrant within the FW Act for FWA and the FWO to initiate programs to support productivity enhancement within enterprises.*⁴²

8.5 The Panel recommended

Recommendation 1: *The Panel recommends that the role of the Fair Work institutions be extended to include the active encouragement of more productive workplaces. This activity may, for example, take the form of identifying best-practice productivity enhancing provisions in agreements and making them more widely known to employers and unions, encouraging the development and adoption of model workplace productivity enhancing provisions in agreements, and disseminating information on workplace productivity enhancement through conferences and workshops. The Panel does not consider that amendments to the FW Act are required to implement this recommendation.*⁴³

8.6 At Chapter 12 of its report the Panel noted at 12.2.2, “*New approach to industry engagement*”, that the new President, Justice Ross, had discussed his views about more direct industry engagement and his desire to give greater emphasis to “dispute prevention”

⁴¹ P 84, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

⁴² P 84, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

⁴³ P 85, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

while recognising that levels of engagement might vary between sectors. The Panel concluded

[...] We recognise that Justice Ross is developing a broader agenda to more actively engage with industry sectors, and that it draws in part on the activities of the United Kingdom's Advisory Conciliation and Arbitration Service. We support this agenda, noting that there is considerable scope within the existing framework of the FW Act for it to be implemented. This aspect of FWA's operations should be clearly distinguishable from its other functions so as to avoid unnecessary confusion.⁴⁴

Item 3 Schedule 5 should not be enacted

- 8.7 The phrase “productive workplace relations” is taken from the objects of the FW Act. Its not clear why an object should now also become a function. If this is appropriate, and it doesn't seem that it is, it raises the question of why other objects should not also be specifically identified as functions of the FW Commission. For example, given the size of the small and medium sized businesses (about 70% of employment), why should promoting solutions for and assisting small to medium sized businesses not be a function of the tribunal?
- 8.8 The Panel did not recommend any legislative change of this kind, and the need for the proposed amendment has not been demonstrated.

⁴⁴ P 251, *Towards more productive and equitable workplaces*, McCallum, Moore, Edwards, June 2012

9. SCHEDULE 6 – TECHNICAL AMENDMENTS

- 9.1 Schedule 6 proposes a number of technical amendments directed to correcting minor technical and typographical errors in the FW Act, mainly arising from the *Fair Work Amendment Act 2012*.
- 9.2 The amendments are necessary and appropriate and do not require an impact assessment. This schedule could be recommended for enactment or, if not, recommended for inclusion in the next statute revision bill.

Australian Business Industrial