



Fair Work Amendment Bill 2013

House of Representatives Standing Committee on Education and Employment

Submission by the Industrial Law Committee of the Federal Litigation Section of the
Law Council of Australia

10 May 2013

This submission has been prepared by the Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia (the Committee). It identifies concerns held by the Committee in respect of three aspects of the *Fair Work Amendment Bill 2013*. The membership of the Committee is listed in Schedule B.

1. Right to Request Flexible Working Arrangements – Schedule 1, Part 3, Item 18

1. The *Fair Work Act 2009* (Cth) (FW Act) presently entitles an employer to refuse a request for flexible working arrangements made by a parent or a person who has responsibility for the care of a child ‘*only on reasonable business grounds*’ (s 65(5)). The term ‘*reasonable business grounds*’ is not defined in any way in the FW Act.
2. The Explanatory Memorandum to the Fair Work Bill 2008, in item 265, explains that the Bill did not identify what may, or may not, comprise reasonable business grounds for the refusal of a request and proceeded to indicate that the term may include, for example:
 - the effect on the workplace and the employer’s business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
 - the inability to organise work among existing staff; and
 - the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee’s request.
3. Clause 65(5A) of the Fair Work Amendment Bill 2013 (the Amendment Bill) starts with the words ‘*Without limiting what are reasonable business grounds for the purposes of sub-section (5)*’ and then lists five items which are said to be included in the term ‘*reasonable business grounds*’.
4. A comparison of those terms with the matters listed in Item 267 of the original Explanatory Memorandum to the Fair Work Bill 2008 clearly indicates that they are much more restrictive than what was said in 2008. The words ‘*without limiting*’ therefore have the opposite effect of what they would normally mean in statutory interpretation.
5. In addition, the five examples set out in the non-exhaustive list in cl 65(5A) of the Amendment Bill are ill-defined and set a very high threshold. For example:
 - (a) What is meant by the phrase ‘too costly’ for the employer?
 - (b) There must be ‘no capacity’ to change the working arrangements;

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- (c) The change must simply be 'impractical' and not reasonably practicable;
 - (d) What will be regarded as significant loss? Fair Work Australia (as it then was) has defined similar terms in the FW Act as indicating 'exceptional circumstances';
 - (e) What will be a 'significant negative impact on customer service'?

6. *The Committee recommends* in respect of Schedule 1, Part 3, Item 18 that:

- a. unless it is intended to render incorrect the description of what may be meant by the expression '*reasonable business grounds*' contained in the Explanatory Memorandum to the Fair Work Bill 2008 at Item 265, the Amendment Bill be redrafted to make clear that such broader grounds may also constitute '*reasonable business grounds*'; and
- b. consideration be given to defining the expressions used in cl 65(5A) to avoid unnecessary litigation concerning the proper meaning of those expressions.

2. Right of Entry – Schedule 4, Division 7

- 7. The proposed amendments to right of entry provisions are wide ranging. They give rise to legitimate policy questions as to whether or not there is a need to broaden existing rights of entry, being questions about which reasonable minds may differ. It is not the approach of the Committee to comment upon such policy questions. The Committee does however wish to identify a conflict in the legislative provisions that would arise if the proposed Division 7 were enacted.
- 8. Proposed Division 7 would impose on occupiers an obligation to provide accommodation to permit holders where accommodation is not reasonably available to a permit holder.
- 9. In particular, cl 521C(2) of the Amendment Bill requires that if four pre-conditions are satisfied, the occupier must enter into an accommodation arrangement for the purpose of assisting the permit holder to exercise rights under that part of the Act. Those pre-conditions are the following:
 - (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.

10. The effect of these provisions is to enable permit holders to enter and occupy premises used mainly for residential purposes. Clause 521C(2) specifically contemplates that whilst in the residential premises the permit holder can exercise rights under the Part.
11. That legislative approach is in conflict with s 493 of the FW Act. Section 493 of the FW Act provides that a permit holder must not enter any part of premises that is used mainly for residential purposes. It is noted that for resource projects, large or small, premises may be purpose built accommodation, mess facilities, recreation rooms etc. No right of entry is currently permitted to these premises under the FW Act.
12. The Committee also notes that the expression used in cl 521C(2)(a), namely, that it would not cause the occupier '*undue inconvenience*' is one that is going to be subject to disputation. For example, will it require accommodation that is in short supply to be made available to a permit holder at the expense of providing such accommodation to an employee?
13. The *Committee recommends* in respect of Schedule 4, Division 7 that:
- a. consideration be given to the apparent conflicting policy that underpins that Schedule and s 493 of the Act.
 - b. legislative guidance be included as to the meaning of the expression '*undue inconvenience*' in sub-cl 521C(2)(a).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian state and territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: Profile of the Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia

The Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia has the following members:

Ingmar Taylor SC (Chair), NSW Bar, Sydney

Peter Kite SC, NSW Bar, Sydney

Richard Bunting, Ashurst, Melbourne

Harry Dixon SC, NSW Bar, Sydney

Ross Jackson, Maddocks, Melbourne

Rachel Doyle SC, Victorian Bar, Melbourne

Jonathan Kirkwood, Victorian Bar, Melbourne

Liz Perry, EMA Legal, Adelaide

Joseph Wearing, Wearing Law, Adelaide

Rob Lilburn, Ashurst, Perth

Craig Green, Page Seager, Hobart

Erica Hartley, Herbert Smith Freehills, Perth

Gail Archer SC, WA Bar, Perth

Joanna Glynn, Corrs Chambers Westgarth, Brisbane

Amber Sharp, Marque Lawyers, Sydney

Geraldine Dann, Queensland Bar, Brisbane