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Submission Fair Work Amendment Bill 2013

This submission has been prepared for the consideration of the Senate Education, Employment &Workplace Relations Committee by the Australian Motor Industry Federation (AMIF).

AMIF is a federation of the various State and Territory motor trades associations and automobile chambers of commerce. Through its Member Bodies, AMIF represents the interests of over 100,000 retail motor trades businesses employing over 310,000 people. Those businesses have an aggregated annual turnover typically in excess of $162 billion, which, in combination with the industry's scope and size, makes the retail motor trades the largest small business sector of the Australian economy.

The majority of businesses represented by AMIF members are small businesses striving to trade profitably, providing a valuable service to the community and employing people. Our members are located in every type of community throughout Australia and provide essential transport, servicing and supply needs for the running requirements of all types of vehicles.

AMIF agree that there is a need to amend the Fair Work Act, although we argue that those amendments be consistent with the recommendations of the Fair Work Act Review Panel, particularly those recommendations to restore the balance called for by employers. The Government's proposed amendments fail to address the issues of concern to business, and do not present a balanced position.

AMIF National Secretariat
Canberra
15 April 2012

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Australian Motor Industry Federation Submission to The Senate Standing Committee on Education, Employment and the Workplace Relations Legislation

concerning

Fair Work Amendment Bill 2013

April 2013

Introduction:

This submission is provided by the Australian Motor Industry Federation (AMIF), whose members are the Motor Trade Associations of South Australia, Victoria, Tasmania, Western Australia, New South Wales and Queensland; and the Automobile Chambers of Commerce of Victoria and Tasmania, AMIF members are the peak employer associations for the automotive retail, service and repair (RS&R) industry in each State.

AMIF and members represent over 100,000 automotive businesses that operate in over 30 industry sectors, employing over 310,000 Australians. Sectors include: Auto-transmission specialists, LPG specialists, Automotive electricians, Alternative fuel specialists, Service stations and convenience stores, Tyre retailers, Smash repairers, Towing operators, Roadside service contractors, Automotive recyclers and dismantlers, Car hire and rental, Engine re-conditioners, Windscreen fitters, Automotive accessory retailers, Motor trimmers, New car dealers, Used car dealers, Commercial vehicle dealers, Truck repairers, Motorcycle dealers, Farm machinery dealers, Commercial vehicle body builders, Specialised vehicle manufacture/ rebuild/modification, Component /parts/automotive product manufacture, Vehicle restoration/ rebuild, Radiator repairers, Air-conditioning specialists, Automobile repairers, Exhaust and undercar, Car wash businesses specialists, Roadhouses and truck stops, Diesel specialists, Vehicle painters and Car detailers.

The majority of businesses represented by AMIF members are small businesses striving to trade profitably, providing a valuable service to the community and employing people. Our members are located in every type of community throughout Australia and provide essential transport, servicing and supply needs for the running requirements of all types of vehicles.

The automotive industry in Australia is largely made up of small businesses. According to the Australian Bureau of Statistics (ABS), 42.9% of automotive businesses have no employees, 51.4% of businesses have 1 – 19 employees, 5.4% have 20 – 199 employees and only 0.3 % has more than 200 employees.

The Bill

Overview:

In noting that the wider purpose of the Bill is to improve the operation of the Fair Work Act, which itself is designed to 'provide a balanced framework for co-operative and productive workplace relations', AMIF is of the view that this purpose will not be achieved by this Bill. The various changes sought will further restrict our businesses' ability to manage their employees effectively. This will especially be the case with small businesses. In their case, if anything, there should be even greater flexibilities allowed to them rather than lesser flexibilities.

In today's economic climate, any change to workplace relations legislation should be enhancing the capacity of business to provide employment opportunities rather than the reverse. Such change should avoid the consequence of causing the potential for further confrontation and confusion, at a time when business needs certainty and a harmonious work environment.

Our response to each proposed amendment is set out accordingly.

Schedule 1 – Family-Friendly Measures:

- Introduce new arrangements to provide for pregnant women to transfer to a safe job (by extending this right to pregnant women who are not entitled, by service, to unpaid parental leave).

  Where an employee does not have an unpaid parental leave entitlement, it is inappropriate to burden the employer with the same obligations when the employee will not in all likelihood be able to return to work in the foreseeable future. If the employee has become unfit they will have access to some personal leave and as it is unlawful to terminate an employee because of a temporary illness or injury, then the employee will gain the benefit of unpaid leave if they have pregnancy related illness or injury in any event. Existing discrimination laws and unfair dismissal laws mean that invariably discussions take place and such employees will indicate whether they intend to return to work after the birth of the child. If this is a reasonable period of time, employment may continue after the birth or the employee formally resigns or abandons employment because they have no entitlement to parental leave and cannot return to work. The existing arrangements are a reasonable balance and should not be disturbed.

  In any event, whilst this proposal serves to give global protection to pregnant employees generally, it ignores that the 12 month service requirement for entitlement to parental leave was introduced for a particular purpose namely to ensure that the employee had properly established herself in her employed role, and demonstrated her suitability, before gaining the entitlement. The concept of transfer to a safer role in the case of an employee who may not even have established herself in a role and who may not have demonstrated her suitability, could easily lead to abuses of that right, with all the consequent cost burdens. It is simply inappropriate for businesses to be exposed to that possibility. In addition, there is the further likelihood that the employee may not even continue in employment after the birth of the child.

  It needs to be understood that the current legislation only commenced in 2010 and that there is no evidence to support the need for change in this area.

  This proposed change is not supported.

- Provide further flexibility in relation to concurrent unpaid parental leave (by extending the leave up to 8 weeks (from 3 weeks) and allowing it to be taken in separate periods of 2 weeks, or shorter, by agreement).

  The taking of concurrent leave by employee couples under the current legislation already impacts upon businesses significantly, in terms of staffing and flexibility issues associated with this.

This is especially the case with small business (less than 15 employees). For that entitlement to be extended by a further 5 weeks, creates the possibility of impacting very detrimentally upon all businesses in meeting their staffing needs. Furthermore, to endeavour to find temporary replacement employees in these circumstances in today's employment climate would be an impossible task.

In the case of small business, this measure could add significantly to the cost of running such a business in the motor industry. Small businesses rely heavily on its staff to generate income for the business. A loss of a person, which in many cases comprises a half, a third or a quarter of the income generating workforce of a small business, has a corresponding effect on that small businesses' capacity to generate the income to meet its liabilities.

In addition to this, the need for such an extension remains unclear, when there does not appear to be any evidence of any complaint by affected employees about the current right. Bearing in mind that the existing legislation has only been in place for a relatively short period since 2010, such a substantial change, without the evidence, seems extraordinarily inappropriate.

This proposed change is not supported.

- Ensure that any unpaid special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave (including allowing available personal/carer's leave to be taken beforehand).

  Although this is based upon Recommendation 4 of the Review Panel, it is made in the face of the Fair Work Act, at its issuance, already allowing the right to extend the initial period of up to 12 months of unpaid leave by up to a further 12 months, to a maximum of 24 months. Consequently, it is open to argue this period could be used to make up the time lost due to any special maternity leave taken. With this facility being allowed, the requirement for this amendment would appear to be unnecessary.

  The proposed change is not supported.

- Expand access to the right to request flexible working arrangements to more groups of employees (including employees who are parents of children of any age, or carers, or have a disability, or are aged 55 or older, or are experiencing violence from a family member or caring for a family member who is experiencing violence; and in the case of an employee returning from parental leave, the right to request part-time employment; in all cases subject to determination according to 'reasonable business grounds' (as described by a new section 65 (5A) in the Bill)).

  It is accepted that there is logic to the current flexible working arrangements, where they are limited to employees who are parents of children under school age (or who are under 18 and disabled), because of the obvious need for the parent in this circumstance to put substantial effort into the care and supervision of such a child.

To claim that such a right should extend to any school-aged child as well, is not so obvious. Other than in very exceptional circumstances, the same level of care and supervision is simply not required. Hence, the need to exercise a right of requesting flexible working arrangements for any school-aged child does not in the ordinary course arise. Any very exceptional circumstances are so unpredictable that it would be much more desirable to be left for the individual parties to deal with, as is presently the case. Much the same can be indicated in the case of employees who are carers or who have a disability. All of these proposed changes would impact detrimentally upon all businesses, but especially small businesses. They are not supported.

Identifying employees aged 55 or older as a category of employee deserving special consideration in the matter of seeking flexible working arrangements seems to fly in the face of government efforts to have employers consider employing older employees on the basis of their life skills, experience, reliability and the like. It seems to suggest that this group of employees has special needs such that they may not be able to work regular business hours thus making this group a less attractive proposition for employment. There is certainly no compelling evidence that this group wants or needs special consideration; and many are likely to be indignant at the suggestion. Whatever that special consideration might be, there always remains access by these employees to personal leave and possibly access to time-off without pay, as may be required.

The extension of the right to cover issues of violence is an unexpected one. Whilst it is understood that the awareness of this concept had its genesis in inquiries by the Australian Law Reform Commission, it is again another example of a very rare circumstance arising, in terms of its impact upon an employee. Whilst it may arise in an employee's life experience, it typically would be an ad hoc event. As such, it may need to be dealt with as a one-off absence from work by the employee. However, it would not normally be ongoing. It would be nothing like the ongoing care of a disabled child for instance. It is hardly something that should feature in workplace relations law.

The extension of the right to cover a request for part-time employment upon the return from parental leave is a circumstance, which has to be acknowledged, as it does arise from time to time, for reasons, which are generally understood. In dealing with such a request however, the business must at all times have the right to determine its response according to issues like those reflected by the concept of 'reasonable business grounds'. It can often arise for instance that a return to part-time employment in a full-time stand-alone position, can create undue operational difficulties for a business.

It is acknowledged that the concept of 'reasonable business grounds' is an appropriate set of ground rules to any of the circumstances relating to requests for flexible working relationships. It is considered sensible that these grounds be set out in the legislation, but only on the understanding that they do not constitute the exhaustive list, and that consideration needs to be given to the particular circumstances of each workplace, including the size of the business and its ability to handle the proposed request.

The automotive industry, like most industries is experiencing severe skill shortages, hence the proposal to extend in the legislation, the right of an employee to request flexibility and the business to reject on such limited grounds, is unnecessary and potentially gives rise to abuse. The fact that the industry is experiencing severe skill shortages and is heavily reliant on labour, employers and employees do reach agreement within the limitations of the business requirements. The trend in employment based on age, shows that there are 37,000 automotive tradespersons between the age of 55 and 64, a rise of more than 18% since 2006/07 (see Auto Skills Australia E-Scan 2013). Given this trend in employment of an older cohort, any abuse of the proposed requirement will tip the viability of the business over the edge.

The proposed (5A)(d) reference to a requirement that changes to work arrangements must result in a "significant loss in efficiency or productivity" before reasonable business grounds arise, is an excessive and unfair test. Why must business bear such a substantial cost before it can refuse such a request? The test as proposed (5A)(e) is equally unfair on business. An employer, and in particular a small business employer, should not have to accept a situation where something just under a "significant negative impact on customer service" are grounds that require an employer to support a request for flexible working arrangements. To require an employer to accept such an impact on customer service or loss of productivity and efficiency has the potential to severely impact on the viability of a business.

The proposed significant extension of the circumstances entitling an employee to seek flexible working arrangements being sought in this reform effectively seeks to make employers responsible to address a multitude of life exigencies impacting on their employees to the ultimate detriment of their ability to effectively run their business. The impact of these requirements is, of course, substantially worse for a small business for the same reasons as stated above concerning concurrent parental leave.

Furthermore, it is again reinforced that the existing legislation has only been in place for a relatively short period since 2010 and such substantial changes, without any evidence of problems, seems premature. The existing legislation needs more time to allow evidence of problems to be identified.

The various proposed changes are not supported.

In the alternative, in light of the likely impact upon small business, as outlined above, it would be appropriate for them to be totally exempted from any of the application of these measures.

- <u>Require employers to consult with employees about the impact of changes to regular rosters and hours of work, particularly in relation to family and caring responsibilities, (for inclusion in Modern Awards with effect from 1 January 2014, and in enterprise agreements made on or after that date, with a consultation process being prescribed).</u>

To an extent, this already exists as an obligation under Modern Awards by virtue of the existing consultation clause requiring consultation to take place where a major change is initiated by the business.

However, the proposed new obligation is specific to rosters or hours of work. This notwithstanding, it is reasonable to conclude that this level of consultation is generally already occurring, at least to the extent that the business can be expected to have knowledge about an employee's family and caring responsibilities. In a small business, particularly in an automotive business, the employer is often working alongside the employees of the business. It is unusual to not know the particular needs of employees, and to instil a formal requirement to consult, complicates and adds complexity to arrangements already in place. The proposed new obligation is hardly warranted and in effect would add complexity to the employment relationship. In addition, such clauses simply provide additional jurisdictions for litigation on technical grounds. Reasonable requests and unreasonable refusals by employers regarding family caring and family responsibilities are already protected through discrimination law. Writing into awards, agreements or in the Fair Work Act, such additional obligations is unwarranted and will add to forum shopping. Further, the proposal intends to extend rights to any rostering change, beyond family and caring responsibilities. This proposal is unwarranted and not supported by the Motor Industry organisations.

Schedule 2 – Modern Awards Objective:

- Amend Modern Awards objective to require that the Fair Work Commission, when ensuring that Modern Awards together with the National Employment Standards provide a fair and relevant minimum safety net of terms and conditions, taking into account the need to provide remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts.

  In the first place, the objectives referred to in this proposed amendment refer to provisions and entitlements that are already reflected in those Modern Awards which deal with shift work and weekend work. To that extent, it begs the question as to why it is seen as necessary for such objectives to now be included in the legislation. It causes the conclusion to be drawn that it is intended as a protection against employer-based applications to vary Modern Awards to either delete or reduce such entitlements under the relevant Modern Awards. However, its inclusion in the objectives will not necessarily provide that protection.

  As an objective, the proposed amendment is out of keeping with the existing objectives. These objectives deal with a whole range of issues, but in each case refer to an underlying employment principle of some kind. They do not deal with entitlement issues. Such issues are obviously left for the discretion of the Tribunal, as indeed they ought to be.

  It is accordingly inappropriate for this new objective to be included in this legislation, and is not therefore supported.

  In any event, it needs to be understood that the objective will not necessarily prevent the Commission from dealing with employer applications to further modify weekend and shift penalties. However, it is fair to say that, notwithstanding the recent Full Bench decision relating to the retail and hospitality industries, there will be future applications from these industries to modify weekend penalties further.

Finally, in the alternative, in the event that this objective is to be included, it is to be understood that it should not be used as a mechanism to modify award provisions that presently allow, or in the future will allow, annualised salaried arrangements.

Schedule 3 – Anti-Bullying Measure:

- Allow a worker who has been bullied at work in a constitutionally –covered business to apply to the FWC for an order to stop the bullying (including relevant definitions).

Whilst it is understood that the proposed measures are in response to the report of the House of Representatives Committee Enquiry into Workplace Bullying, it fails to give sufficient recognition to the processes which are already in place to deal with such matters in an expeditious manner. Typically, bullying issues are capable of being dealt with either Federal or State work health and safety legislation. In some cases these issues are also able to be dealt with via State equal opportunity or anti-discrimination legislation.

Each of these processes has, to varying degrees, the capacity to have complaints dealt with through a conciliation or mediation process. If those processes are not enabling complaints to be dealt with expeditiously, it is reasonable that the relevant Governments be requested to introduce legislation, or effect administrative changes, to achieve that outcome.

The difficulty may be that such a process would take time. The advice could be provided however, that if the relevant legislation or administrative change is not achieved within a nominated time frame, say twelve months, then the Fair Work legislative change sought would be enacted.

The problem with the Fair Work Commission being granted a specific role in bullying matters, is that it is likely to only cause further confusion as to how a complainant ought to proceed to have the complaint dealt with, or otherwise addressed Furthermore, it creates the potential to resort to payment of 'go away money' and/or forum shopping, which has already been an undesirable and frustrating outcome of the General Protections section of the Fair Work Act.

The proposed measures are not supported in any respect.

Schedule 4 – Right of Entry:

- Give the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes.

It is noted at the outset that this proposed facility has arisen from a Recommendation of the Review Panel (No. 35), based upon their review of the submissions and evidence before them. In making such a Recommendation, they did observe that the issue of frequency of visits was '…….a more significant problem for large worksites where several unions are

eligible to represent the employees, such as those in the mining or construction industries.' (P. 193 of Review Panel Report).

To date there has been no dispute relating to frequency of visits, brought before the Fair Work Commission arising in the automotive industry, although there is evidence of abuse of frequency by one union in the industry. These abuses often occur when the union does not have members on the site and is endeavouring to recruit, despite the wishes of an individual to exercise their right concerning freedom of association.
To that extent, for employers to be able to have available the facility of the FWC dealing with disputes regarding frequency of visits and other abuses by Unions of their right concerning entry, is a desirable step, and is supported.

- Provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder or in the absence of agreement, in any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal and other breaks and is provided by the occupier for that purpose.

Once again, this proposed provision draws from a Recommendation of the Review Panel (Recommendation 36) but does not adopt the Recommendation, as its purpose is to specify a default location for interviews and discussions, where a dispute has arisen in regard to the location. This proposed amendment should be rejected on the basis that the meal room may not be an appropriate venue in many situations. Moreover, employees will often object to having to put up with meetings conducted by union representatives, which has the potential to lead to disputes and disruption in a workplace. Many workplaces do not allow meals to be taken at desks or in the workshop so employees will have their meal break disturbed. Meal breaks are periods of time when employees have an opportunity to rest and recuperate before returning to work. Why should this be the default location? Where no suitable location is available within the premises, and this is the case in many small businesses, why should the union representative's needs be met against that of employees of the company? Employees who are not members of the Union or who are simply not interested in listening to information provided by a union, will have their lunch time disrupted. In the view of the Motor Trades Organisations, it could open up the argument of breaches of freedom of association and an employee's right to have 'quiet enjoyment in a workplace'. It may therefore cause the union representative to be inconvenienced with having to meet employees in a convenient location close to the workplace outside the premises.

In the automotive industry, as represented by the Motor Industry Organisations, this has not proven to have been a major issue. However, this default position means that unions will simply reject the rooms offered and disputes will inevitably occur if this is put in place. There have been quite clearly been instances where employees of members have rejected the notion of having a union representative conduct meetings whilst they take their meal break in the lunch room. Inevitably this type of provision will only work against the intent of the Act and create disputes between fellow employees and between employers and unions.

Where a dispute over location arises then there needs to be a sound basis for the union rejecting the proposed location. A reasonable basis, after assessing the situation, may be that the proposed room is too small or that there is no other room sufficiently located to allow the conduct of a meeting. An employer should have a right to have such disputes dealt with by the FWC; such disputes are already included within subsection 505.

AMIF opposes this proposal on the basis that it expands union entry rights unnecessarily and provides direct access to non-union employees, irrespective of their right to choose to either be a member, or not to be a member of a union

- Facilitating accommodation and transport arrangements for permit holders in remote areas (and other matters).

- Giving FWC capacity to deal with disputes in relation to accommodation and transportation matters.

These provisions are intended to deal with remote areas issues, where the occupier provides the facilities.

They are however not supported.

Schedule 5 – Functions of the FWC:

- Confer on the FWC the function of promoting co-operative and productive workplace relations and preventing disputes.

This proposed amendment is unnecessary as the object of the Act relates to a balanced framework of cooperative and productive workplace relations and promotes economic prosperity and social inclusion. Conferring on the Fair Work Commission this additional function ultimately extends its powers beyond the functions listed in section 576.

Concluding remarks:

AMIF agrees that there is a need to amend the Fair Work Act, although we argue that those amendments be consistent with the recommendations of the Fair Work Act Review Panel, particularly those recommendations to restore the balance called for by employers. The Government's proposed amendments fail to address the issues of concern to business, and do not present a balanced position. Most alarmingly, most of the proposals contained in this Bill are outside of the Review panel's recommendations, there is no good reason for their adoption, rather their adoption will have the effect of inhibiting productivity, competitiveness and work place flexibility.

Further proposed amendment - National Employment Standards (NES) - Annual Leave:

Although not forming part of the Bill, the following important proposal is brought to the Committee's attention by the Motor Industry Organisations, namely:

Section 90 – Payment for annual leave.

This issue was raised in the Motor Industry Organisation's submissions to the Fair Work Act Review Panel (the Panel) in February 2012. Significantly, it was one of the recommended changes identified by the Panel.

'Recommendation 6: The Panel recommends that s90 be amended to provide that annual leave is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect'.

We raise it again as a matter of urgency to provide further clarity in its application on the payment of annual leave under this section.

- Section 90(1) makes it clear that the payment for annual leave is at the 'base rate of pay'. Section (90)(2) indicates that upon termination an employee is paid the 'amount' they would have been paid if they had taken the leave. It is our view that the 'amount' referred to in s90(2) when read in conjunction with S90(1) is a reference to the 'base rate' payment of the employee.

- Modern awards such as the Vehicle Manufacturing, Repair, Services and Retail Award 2010[MA000089] (the Vehicle Award) provides for the payment of an annual leave loading when leave is taken. However, clause 29.8 - Untaken leave on termination, prescribes that leave loading 'will not apply to the payout of untaken leave on termination'.

- The Vehicle Award was created after the establishment of the NES. Clearly, the Vehicle Award recognises the impact of the NES on the Award in clause 29.7(a) where it prescribes a different and more beneficial payment than the 'base rate of pay' under the NES for annual leave when it is taken during employment.
  Clause 29.7(a) provides in part:

  '*Instead of the base rate of pay as referred to in s.90(1) of the Act, an employee under this award , before going on annual leave , must be paid the wages they would have received in*

respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period. During a period of annual leave an employee will also receive a loading as follows:-----'

- The terms of clause 29.8 are also consistent with the terms of the pre-reform award from which it was derived and it represents the historically accepted position in relation to the payment of loading on untaken leave termination in this industry.

- Notwithstanding the above, the Fair Work Ombudsman (FWO) during 2011 took the view that the NES under s90 required the payment of loading on untaken leave on termination. As indicated in the Panel's recommendation, this view is inconsistent with the interpretation of employer parties and have meant that long standing arrangements in this award have been disturbed without the consent of the relevant industrial parties and have in fact added to employer costs which is not in line with the objectives of modern awards.

- In our view, the Full Bench of the AIRC is unlikely to have allowed the inclusion of clause 29(8) if it was inconsistent with the NES.

- While there have been ongoing discussions with the FWO in relation to this matter, it is fair to say that both the employer parties and the FWO recognise that it is an undesirable situation that should be addressed urgently. We understand that there are other modern awards that have similar issues.

It is accordingly recommended: That a formal note be included at the end of s90 of the Act as follows:

'Note: Section 90 does not prescribe conditions in relation to the payment or non-payment of the annual leave loading applicable under a modern award, enterprise agreement or a WR Act instrument.'

AMIF and its members express gratitude to the Committee for the opportunity to comment on this issue and to provide the Committee with its input. If there is any further clarification or detail that the Committee might require, please do not hesitate to contact this Office.

AMIF National Secretariat

Canberra

15 April 2013