Business Council of Australia

submission

Submission to the Senate Standing Committees on Education, Employment and Workplace Relations in relation to the Fair Work Amendment Bill 2012

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Working to achieve economic, social and environmental goals that will benefit Australians now and into the future

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About the BCA

The Business Council of Australia (BCA) brings together the chief executives of 100 of Australia's leading companies.

For almost 30 years, the BCA has provided a unique forum for some of Australia's most experienced corporate leaders to contribute to public policy reform that affects business and the community as a whole.

Our vision is for Australia to be the best place in the world in which to live, learn, work and do business.

The workplace relations system Australia needs

Australia is on the way to becoming a high-wage, high-cost, low-productivity economy and this is posing huge challenges to our international competitiveness.

Like all developed economies, there are potential threats to Australia's future economic prosperity as new competitors emerge, the pattern of global trade changes and the population ages.

While Australia is well placed to share in the benefits of the Asian Century, this will not happen if Australian businesses are not able to innovate quickly and develop new business models underpinned by modern and collaborative workplaces.

Over three decades, the Business Council of Australia has looked at the features of workplace relations systems, here and around the world, that promote positive workplace cultures, competitiveness, productivity and employment in the context of an economy's changing needs.

Creating employment will continue to be important, both as a means of enabling social and economic inclusion but also in facilitating the workforce participation rates the economy needs to grow.

Economic performance thrives in a regulatory system that gives businesses the flexibility they need to stay competitive and employees the flexibility to work in different ways in balance with their personal lives.

The economy of the future will be different from the one we have today. We know that structural adjustment and taking up new market opportunities depend on the capacity of employers to move quickly and offer employment in different forms.

We know that the workforce of the future will be more diverse and want to engage in different ways.

As we have seen over the last decade, alternative employment arrangements will enable people to participate in the workforce who were not encouraged to do so previously.

Australia's workplace relations system must support business innovation and high-performing workplaces that are collaborative rather than adversarial, recognising the needs of employees and enterprises.

The system must work to deliver fair remuneration outcomes and provide a safety net to protect less empowered workers. It must be simple and efficient, promote safe and healthy workplaces, and not hamper the creation of jobs.

Productive, high-performing workplaces innovate in response to changing market circumstances and requirements, and to the changing nature, composition and preferences of workers and prospective workers.

By saying that businesses need 'flexibility', this is what we mean.

Our experience of the Fair Work Act

When it was introduced, the Fair Work Act was described as providing a balanced framework for cooperative and productive workplace relations that would promote national economic prosperity and workforce participation.

The experience of members of the Business Council of Australia suggests that this has not been the case. Experiences of particular concern can be summarised as follows:

- the system has led to a re-emergence of more aggressive and adversarial behaviour by unions in some sectors of the economy
- employers face cultural and attitudinal obstacles to developing more collaborative and productive workplaces
- third party intervention by unions and the tribunal on non-company specific matters is compromising the capacity of businesses to enhance their competitive strengths in volatile economic times
- the system is being used to facilitate intervention in, or veto of, business decision making beyond the rights and conditions of employees
- the system does not support a modern business approach to lifting productivity through ongoing innovation and improvement
- the bargaining process is not providing the collaboration needed to make innovative, new (greenfield) projects viable
- when economic conditions have increased the need for Australian businesses to be nimble, the time it takes to settle matters is variable and unpredictable.

Put simply, in its current form the Fair Work Act does not provide a framework that allows businesses, as drivers of national wealth, to function in the best interests of all stakeholders.

In some sectors we have already seen substantial delays in the start of projects due to protracted industrial negotiations leading to significant cost impacts for the project.

Instead many aspects of the legislation have the effect of limiting the ability of businesses to stay competitive in volatile times and, in many cases, to meet the needs and preferences of employees and prospective employees.

Fixing the problem

By amending the Fair Work Act to take account of these experiences, the government can do much to support the operation of a labour market that better serves Australia in 2012 and beyond.

Attached to this submission to the committee is the BCA's initial submission to Fair Work Act Review, which includes a comprehensive set of recommendations designed to:

- encourage more collaborative workplaces
- provide employers and employees with a full menu of employment options
- restore options for businesses to innovate and adapt
- reduce the capacity of third parties to interfere in the way a business is run.

These recommendations focus on:

Bargaining processes: amendments to improve the validity and efficiency of bargaining processes

- establish more robust bases of establishing majority support for bargaining, allow this support to be tested when negotiations are lengthy and unproductive; make them a precondition for protected action

- reduce the range of matters upon which bargaining can occur, and specifically make unlawful those clauses that restrict the use of, or regulate the payments to, contractors
- prevent late entry of bargaining representatives to the bargaining process, other than in exceptional circumstances
- ensure that the scope of bargaining relates only to the classes of employees with whom the employer has agreed to bargain.

Flexibility arrangements: amendments to strengthen flexibility arrangements for both individuals and employers, and remove the capacity to restrict the use of contractors

- mandate the agreed individual flexibility model clause
- make unlawful those clauses that restrict the use of, or regulate the payments to, contractors.

Industrial conflict/disputation: amendments to reduce the capacity for unnecessary industrial disruption by removing enablers in the legislation and providing employers with more capacity to respond

- require majority support determinations to be made before protected action applications can be made
- put more effort into dispute prevention, as opposed to dispute management and settlement
- enable Fair Work Australia to suspend all protected action for up to 90 days in certain circumstances and expand their capacity to suspend action for the purposes of 'cooling off'
- introduce employer options for earlier industrial action as an alternative to full-scale lock-out.

Agreement approval: amendments to improve the efficiency and predictability of Fair Work Australia decisions to enhance the credibility of the tribunal

- reduce delays by increasing the discretion of Fair Work Australia to approve agreements despite technical breaches of requirements; require agreements to be dealt with within 30 days
- clarify that the Better Off Overall Test (BOOT) is to be applied as an overall test and on classes of employees
- review all Fair Work Australia forms with a view to simplifying them.

Greenfield projects (new projects): amendments to provide more efficient and timely outcomes, and help overcome impasses

- create more employment options such as employer-only agreements
- require the good faith bargaining principles to apply to greenfield project negotiation
- lower the threshold for application of the public interest test to allow earlier intervention for cases of significant harm.

Transfer of business: amendments to remove unintended, negative consequences for both employees and employers

- restore the 12-month sunset clause for transferring instruments
- articulate more clearly the triggers to the provisions to ensure that they do not interfere with sensible redeployment of skills and assets
- ensure that the provisions do not apply to employees transferring between associated entities where there is an unexpired enterprise agreement binding on the new employer.

General protections/adverse action: amendments to reduce the scope of the general protections (adverse action claims) to align with other anti-discrimination legislation; re-introduce the 'sole and dominant' test as the basis for claim.

Modern awards: review the modern awards to address anomalies between awards and ensure that they allow companies to be competitive.

Australian Building and Construction Commissioner: retain the ABCC.

Compulsory superannuation contribution increase: legislate to ensure that the increase is offset against future wage increases and is taken into account when Fair Work Australia is setting the minimum wage.

Assessment of the first tranche of amendments to the Fair Work Act 2012

Included in the current Bill are a number of amendments that are of concern to the BCA.

Creation of two statutory positions of Vice President

From our perspective the need for the creation of these additional positions and the requirement that they be statutory positions is unclear. Neither the Fair Work Act Review Panel nor submissions to the review have identified the absence of these statutory positions as inhibiting the performance of Fair Work Australia.

There is a need to make clear the grounds for the proposed amendment and the evidence of benefits it may bring to the operation of the tribunal before the amendment is progressed.

More broadly in considering appointments to the tribunal ensuring Fair Work Australia has available members with strong business acumen and experience, ability to understand the economic consequence of decisions and commercial experience is essential. A transparent appointment process that includes a selection process premised on open advertising, competition for appointment and recruitment on the basis of merit is essential.

Prevention of opt-out terms in enterprise agreements

The proposal to prevent opt-out clauses in enterprise agreements is disappointing. Such clauses provide for the situation where individual employees for a range of reasons may wish to have an alternative employment arrangement with their employer.

It is of particular concern that this amendment is retrospective and will remove the opportunity to use opt-out clauses in current agreements in the future.

The BCA is of the view that neither of these amendments should be progressed in the manner in which they have been proposed.

Until evidence is provided to justify the additional vice president positions, this amendment should not proceed.

The option for opt-out clauses should not be removed and instead any ambiguity with regard to the current legislation should be removed to ensure they are an available option.

Conclusion

The BCA is disappointed that the first tranche of amendments to the Fair Work Act fail to address the critical issues that will improve Australia's competiveness and the capacity of businesses to create additional employment opportunities.

In particular these amendments do not provide options that address the following priority matters:

- there has been no reduction in the range of matters that can be negotiated and in particular no effort has been taken to preclude clauses limiting the use of contractors and labour hire firms
- there has been no improvement in access to individual flexibility arrangements

- while the inappropriate use of the 'aborted strike technique' has been acknowledged through the recent Fair Work Act review, there is no amendment to resolve this issue
- arrangements for the effective and timely development of greenfield agreements remain unresolved
- transfer of business arrangements as they currently stand do not work well.

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

Contact Ms Maria Tarrant, Deputy Chief Executive, maria.tarrant@bca.com.au with any queries in relation to this submission.

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