Fair Work Amendment Bill 2012
Submission to the Senate Education, Employment and Workplace Relations Committee

Prepared by the Victorian Automobile Chamber of Commerce

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Contents

1. Introduction 3

VACC principal services 3

Industry sectors represented by VACC 4

2. Executive summary 4

3. Terms of reference 5

4. Annual leave loading on termination of employment 6

5. Further comment 9

1. Introduction

The Victorian Automobile Chamber of Commerce (VACC) is the peak industry employer association in the retail automotive industry (RS&R Industry) representing 5,300 members in Victoria and Tasmania. VACC also represents 335 businesses in Queensland, which have joint membership of both the Motor Trades Association of Queensland and our organisation. This representation covers businesses that operate in over twenty industry sectors (set out below) employing over 40,000 employees in the automotive repair, services and retail sector.

VACC principal services

VACC supports the RS&R industry by providing a comprehensive range of services including the following:

- Public affairs advocacy and representation of key industry policy issues to government and other industry stakeholders
- National industry magazine highlighting current and emerging industry issues
- Preparation of submissions on industry issues to Federal and State Governments
- Supply of apprentices through the VACC Auto Apprenticeship Scheme which currently employs over 500 apprentices and trainees working within the retail automotive sector across Victoria and Tasmania
- Technical advice to members within a range of industry sectors
- Promotion of the industry including the Melbourne International Motor Show
- Community events sponsorship
- Education and training sponsorship
- Road safety information
- Industrial relations, OHS and environment advisory services
- Newsletter highlighting issues in industrial relations, OHS and environment
- Industry courses organised through the Skills Development Centre, and
- Surveying and supply of statistics and economic data.

Industry sectors represented by VACC

VACC provides services to the following sectors in the RS&R industry:

- New car dealers
- Used car dealers
- Commercial vehicle dealers
- Truck repairers
- Motorcycles dealers
- Farm machinery dealers
- Commercial vehicle body builders
- Radiator repairers
- Air-conditioning specialists
- Automobile repairers
- 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
- Exhaust and undercar specialists
- Diesel specialists
- Vehicle painters
- Car detailers
- Car wash businesses
- Roadhouses and truck stops

2. Executive summary

The Fair Work Amendment Bill 2012 should include a provision that amends section 90 of the Fair Work Act 2010 to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.

3. Terms of reference

On 01 November 2012 the Senate referred the Fair Work Amendment Bill 2012 to the Senate Education, Employment and Workplace Relations Committees for inquiry and report.

The Bill is the first tranche of the government's response to the review of the Fair Work Act 2009.Amendments include:

- Changes to the relation to striking out applications to vary modern awards in certain circumstances and in relation to the parties able to apply to amend modern awards;
- Notification requirements for scope order applications, and the form of the notice of employee representational rights;
- Clarifying that opt-out terms cannot be included in enterprise agreements, that enterprise agreements cannot be made with only one employee and that a union official from one union cannot act as a bargaining representative where that union does not have coverage;
- Aligning the time limits for lodging unfair dismissal claims and general protections claims involving dismissal at 21 days, and new measures in relation to dismissing unfair dismissal applications and costs orders;
- Clarifying which union members are able to vote on and participate in protected industrial action and the conduct of protected action ballots, including allowing for electronic voting and requiring ballots to be conducted expeditiously;
- Changing the name to the Fair Work Commission (FWC);
- Providing for the appointment of the General Manager to be made on the nomination of the FWC President;
- Allowing stay orders to be made by Presidential Members;
- Allowing for the appointment of acting Commissioners;
- Creating 2 statutory positions of Vice President;
- Including a process to deal with complaints against FWC members and streamlining provisions dealing with conflicts of interest of members, and
- other minor amendments to improve the conduct of matters before the FWC.

The Bill would also amend the FW Act to give effect to the Government's response to the Productivity Commission's Report into Default Superannuation Funds in Modern Awards, including:

- Introducing new requirements in relation to modern award terms about default superannuation, and the process under which the FWC would review default fund terms every 4 years, at the same time as the 4 yearly review of modern awards; and
- Provide for the establishment of an Expert Panel, which will subsume the functions of the Minimum Wage Panel.

4. Annual leave loading on termination of employment

On 15 October 2012, the Minister for Employment and Workplace Relations announced the federal government would implement "a first tranche of recommendations" arising from the independent Fair Work Act Review.

The amendments announced by the federal government did not include the recommendation to amend section 90 of the Fair Work Act. In the recently-released review "*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*", the Review Panel recognised that the operation of section 90 of the Fair Work Act is ambiguous. As a result, recommendation 6 of the Review Panel provided:

> "The Panel recommends that s.90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect."

Modern awards such as the Vehicle Manufacturing, Repair, Services and Retail Award 2010 applicable to the vehicle industry provide for the payment of annual leave loading when leave is taken. But clause 29.8 of the award expressly states that the leave loading is not paid on untaken leave paid out on termination.

Clause 29.8 states:

> "Subject to clause 29.6(b) an employee who has outstanding or untaken paid annual leave due when the employment contract ends must be paid the amount that would have been payable to the employee under clause 29.7(a). Payment of either leave

loading or the higher shift loading payment instead of leave loading prescribed in clause 29.7(a) will not apply to the pay out of untaken leave."

Clause 29.7 of the award also provides a different and more beneficial payment than the "base rate of pay" under the NES for annual leave when leave is taken during employment.

Clause 29.7 provides:

"Payment for period of leave

a. 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:

   i. Day workers

   Employees who would have worked on day work only had they not been on leave—17.5% loading.

   ii. Shiftworkers

   Employees who would have worked on shiftwork had they not been on leave—17.5% loading or the shift loading, whichever is the greater but not both.

b. Subject to clause 29.7(c), the wages to be paid must be worked out on the basis of what the employee would have been paid under this award for working ordinary hours during the period of annual leave, including allowances, loadings and penalties paid for all purposes of the award, first aid allowance and any other wages payable under the employee's contract of employment including any over award payment.

c. The employee is not entitled to payments in respect of overtime, special rates or any other payment which might have been payable to the employee as a reimbursement for expenses incurred."

The current operation of section 90 of the Fair Work Act is unclear and has resulted in great confusion and frustration for small automotive businesses across Australia and many other businesses in other industries.

Section 90(1) provides the payment for annual leave is at the "base rate of pay". Section 90(2) indicates that upon termination an employee is paid what he would have been paid if he had been working and he had taken the leave.

It is our view that section 90 reflects the payment applicable for an employee covered by the National Employment Standards. Awards prescribe the amount of annual leave loading that is paid when employees proceed on annual leave, not the minimum annual leave standards prescribed by s. 90 of the National Employment Standards.

Unfortunately, the Fair Work Ombudsman has taken the view that the section 90 requires the payment of annual leave loading on untaken leave. This is a departure from the accepted position over the history of award coverage extending back 40 years in the vehicle industry and most other industries since the introduction of the annual leave loading as a general award provision. For employers in the vehicle industry, a requirement to pay leave loading on termination will be a significant additional cost burden. Employers were under the clear understanding that the modernisation of awards, based on the Award Modernisation Request would not lead to additional cost burdens on businesses. Significantly, the Review panel noted that payment of annual leave loading on termination "would have the most negative impact on affected small businesses".

In the recent decision of Inghams Enterprises Pty Limited re Inghams Enterprises (Byron Bay) Processing Enterprise Agreement 2012 - [2012] FWA 8668 - 23 October 2012, the operation of section 90(2) interfered with a clause in the enterprise agreement that provided for annual leave loading not to be paid if an employee resigned for any reason other than permanent and total incapacity. Commissioner McKenna stated that the annual leave loading clause in the enterprise agreement "probably runs foul of the provisions in s.90 of the Act".

Commissioner McKenna stated in his decision that she "respectfully agree[d] with the comments of the Review Panel that the matter would benefit from legislative clarification.

This is a widespread problem that was acknowledged by the Review Panel. Of the 112 modern awards that include provisions relating to leave loading, 29 of them explicitly provide that leave loading is not payable on termination of employment. This will continue to affect many thousands of employees if the matter is not clarified.

We urge the Senate Committee to add to the first tranche of amendments the proposed changes to section 90 as recommended by the Review Panel and supported by Commissioner McKenna in the *Inghams* decision. It is a matter that urgently needs clarification so that the thousands of small and medium-sized businesses that are affected by this can rely on the provisions of their awards with confidence.