TIMBER MERCHANTS ASSOCIATION
Established 1883

Committee Secretary Senate Education,
Employment and Workplace Relations
Committees PO Box 6100
Parliament House Canberra ACT 2600

April 14th 2013

Dear Sir/Madam

Re: Fair Work Amendments bill

Thank you for requesting a submission as to the amendments to the Fair Work Amendment Bill 2013.

Overview of our response:

The position of the TMA is that we cannot support the amendments "package" as presented for the following reasons:

1. The lack of definitive consultation with industry during the process does not create an environment of trust, cooperation and support needed from Government to generate jobs growth.
2. There appears to be an underlying assumption that the majority of businesses are incapable of managing employees in a manner that is beneficial to both employee and business. The majority of businesses operate in a fair and just manner. The implication is that Fair Work become more actively involved in deciding aspects of the operational decisions made by a company. Operational decisions are made by a company to maintain competitiveness both domestically and internationally. It is the objective of management to communicate as effectively as possible with staff, and the majority do. To place controls in the Bill is attempting to legislate behaviour, and should not be contemplated.
3. The proposals imply that the amendments will effectively control the relationship between the employer and employee, and seek to position the union as the beneficiary. Given that the majority of employees do not desire Union representation the Bill effectively forces employees to no longer have a choice about Union exposure. This is hardly democratic and is most certainly not what workers desire.
4. Many of the items proposed for amendment are already overly complex and the changes do not appear to truly consider both employee and business needs.
    i. The parental leave requirements
    ii. The remuneration parameters around irregular or unpredictable hours
    iii. The definition of a safer environment
    iv. The definition of a "cooperative and productive work place relations to prevent disputes"

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5. Bullying: the proposal is too open to individual interpretation to provide a declarative response. The amendments imply:
    a. that something as simple as a wrong word could be defined as bullying, and would potentially limit the possibility to have candid discussions with employees. To attain an harmonious environment requires consensus through open and candid discussions.

The tone of the amendments to the Bill fails to consider the social and personal requirements of the individual in areas of right of entry. As presented in our letter to the Rt. Hon. Shorten we do not support this initiative.

The overall tone of the amendments proposed is one of trying to place into the Bill a way to control behaviour of management and provide to permit holders easier access and privileges to meet with workers. It is the view of the TMA that this will create an imbalance in the working environment at a time when cooperation and creative discourse is required.

It is also the view of the TMA that you cannot legislate behaviour. The significant investment Government has made in building appropriate awards and regulations with regards to employee remuneration and a safe working environment has encouraged the majority of business owners and managers to be communicative and fair in their relationships with their respective employees.

If Australia wishes to be taken seriously on the world stage, the necessity is to move away from old style management and old style regulations that do not advance the environment in which businesses prosper and jobs are created. Legislating employer responsibilities in an overly prescriptive manner will suppress growth of a company and ultimately the economy.

Small to medium companies are the back bone of the economy. SME's create new and innovative solutions that become the cornerstone to the future of our country. Instead of activity that depresses the very core of our economic success it is the view of the TMA that greater focus should be undertaken to:

- Support innovation through appropriate research and development funding and taxation benefits.
- Encourage the business environment though proactive support for management and employee training so as to encourage openness and creative vitality in the business environment.
- Recognise the value of industry insights and experience through engagement and involvement in a clear and decisive review.

In a high cost high value environment the assumption must be that businesses are capable of dealing openly with employees. As we have seen in other countries the more an economy encourages openness the greater the innovation and the stronger the economic growth.

The proposed amendments to the bill do nothing to improve the environment for small to medium sized businesses in fact it is our view that they will continue to discourage innovation, trivialise the role of business in job creation, and isolate the majority of hardworking Australians whose combined effort is to ensure we continue to build a healthy and vibrant economy.

TMA contribution to the content of the bill

The TMA would like to propose the following regarding the content of the Bill:

Proposed changes to parental leave provisions:

Many small businesses (particularly those that are too small to warrant the employment of specialist human resources staff) find the parental leave provisions incredibly complex and difficult to interpret. This is particularly the case when employers realise that they are not only meant to be managing the leave entitlements of their employee, but also taking into account the leave that will be taken by the employee's partner or spouse.

Another recent change that has complicated the operation of parental leave provisions in a practical sense in the workplace is the advent of Paid Parental Leave. Some employees find themselves in the position of qualifying for PPL from Centrelink, but not for Parental Leave under the National Employment Standards. In a situation where an employee wishes to take Parental Leave, but is not entitled to it, and then is being paid by the employer for the PPL entitlement, it can be very confusing. This can put businesses, particularly small businesses, in conflict with their workers, and in a situation where the employer feels forced to provide leave that they are not technically required to grant.

We would also note that eight weeks of concurrent leave is a lengthy absence from work (whether paid or unpaid) for an employee of a small business, particularly those businesses with fewer than 15 employees. This lengthy absence can make management of the business especially difficult, as in a business that small, every employee is a key employee.

Flexible working arrangements

The Bill significantly expands the basis on which an employee can "request" flexible working arrangements. In fact, many employers find that an employee approach regarding flexible working arrangements is rarely a 'request', and could more properly be characterised as a 'demand'.

The Bill fails to allow an employer to request even 'evidence that would satisfy a reasonable person' that the basis on which the employee makes the request is genuine, thus leaving the employer potentially in a position of being required to provide flexible working arrangements to an employee who does not even have to prove that the it is justified.

Again, this will disproportionately impact on smaller businesses, with many employers likely to feel that to refuse an employee's demand, even on eminently reasonable business grounds, will lead to a deteriorating climate in the workplace.

A particular concern is the expansion of the rights of employees returning from parental leave to 'request' part time work. To date, this has not been a requirement on businesses, particularly small businesses, as the employee's right to return to work was a right to return to the pre-Parental Leave position. The government is proposing to force businesses of all sizes to give up managerial prerogative and a say in the way they run their businesses, by requiring that they offer part time work.

Requirement for modern awards to explicitly provide for consultation about changes to rosters or working hours

The proposed change to the Fair Work Act 2009 will have no practical effect. Modern awards are already required to contain provisions requiring an employer to consult with employees about major changes that have significant effects on employees. The model clause developed by the Australian Industrial Relations Commission for insertion in all modern awards defines 'significant effects' as including 'the alternation of hours or work'. Therefore, employers are already required to consult with employees if there will be changes to hours of work.

The proposed change is yet another loss of managerial prerogative and loss of the ability for businesses to set the hours of the business to suit the needs of the business. If the needs of the business are not being met, then there is no way that the business can continue to meet the needs of the employees.

Changes to modern awards objectives

Modern awards are meant to promote flexible, modern work practices (section 134(1)(d) and social inclusion through increased workforce participation (section 134(1)(e)). Other objectives for modern awards are far less specific than the proposed amendments, which actually go into detail about matters that are more properly considered at an industry and modern award level.

We are also concerned that section 134(1)(f) is being completely ignored, in that the likely impact of this change on business, including on productivity and employment costs, and the regulatory burden, is apparently not being considered at all.

Bullying provisions

We are concerned that the Bill proposes the use of definitions taken from an Act of Parliament that has no application in Victoria, namely the Work Health and Safety Act 2011. This is likely to cause immense confusion for businesses, particularly smaller businesses, who on the one hand are being told that the Act has no relevance in Victoria, but apparently now will be told that they should be familiar with some of the definitions in the Act.

Unfortunately we can foresee a situation arising, in which employees who are being performance managed, even for perfectly reasonable causes, and in a perfectly reasonable manner, can complicate matters and draw the process out by alleging that the process is bullying, and requiring the employer to attend the tribunal. Even if the tribunal subsequently finds that the management action was reasonable, there is no sanction on the employee for misusing the provisions of the Act.

This is potentially particularly off-putting for small businesses, who find compliance with the unfair dismissal provisions of the Act and performance management in general quite challenging, and could potentially lead to a reluctance to manage performance even where it is clearly required.

Right of entry – automatic right to use the lunch room

This change amounts to an automatic right for permit holders to ensconce themselves in the lunchroom for the purpose of holding discussions with employees. No union organiser, in the experience of our members, has even voluntarily agreed to meet to hold discussions anywhere other than in the lunchroom, despite many employees objecting to the presence of the organiser in the room. In practice, this will mean that the government is simply driving employees out of their own lunch rooms.

Our members have experienced situations where a union organiser turns up on a weekly basis for months at a time, attempting to drum up membership – leading to a situation where those employees who are not interested in listening to the union organiser are forced to find an alternative place to eat their lunch.

Right of entry – frequency disputes

Again, our members have experienced a situation where the union organiser will turn up on a weekly basis for months at a time, but under the proposed changes, the employer would have to demonstrate that the frequency of the visits unreasonably diverts their critical resources to have any chance of having the tribunal deal with the dispute. This leaves employees who are sick of the presence of the union, and employers who wish to help them reclaim their lunchroom, with nowhere to go. The standard the employer must achieve in demonstrating that the visits are too frequent is far too high.

Sincerely

Eric Siegers
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Timber Merchants Association.

Ron Caddy
President
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