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AFEI Submission

Inquiry into the Fair Work Amendment Bill 2013

House of Representatives Standing Committee on Education and Employment

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Australian Federation of Employers & Industries

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Australian Federation of Employers and Industries (AFEI)

The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.

With over 3,500 members and over 60 affiliated industry associations, our main role is to represent, advise, and assist employers in all areas of workplace and industrial relations and human resources. Our membership extends across employers of all sizes and a wide diversity of industries.

AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. We have been the lead employer party in running almost every major test case in the New South Wales jurisdiction and have been a major employer representative in the award modernisation process under the Fair Work Act.

AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

Introduction

1. The Fair Work Amendment Bill 2013 is unbalanced and unwarranted. The Bill considerably expands the entitlements of workers and unions, presents compliance difficulties for employers and does not provide a balanced approach for cooperative and productive workplace relations. The proposed amendments do not address the problems and shortcomings identified by employers in the 2012 Review of the *Fair Work Act 2009* (the FWA). To the contrary, many of the proposed changes were not recommended by the Review Panel.

2. The Bill is clearly founded on the assumptions that the employment relationship is based on conflict, that employers must be closely regulated and require third party intervention in the management of their workplaces, regardless of the impact this regulation will have on business efficiency and job creation.

3. We note that, as with the introduction of the FWA and its earlier amendments, the Prime Minister granted an exemption from the Regulation Impact Statement requirements for these amendments on the basis of exceptional circumstances.[1]

SCHEDULE 1 – FAMILY-FRIENDLY MEASURES

Employer obligations for leave taking extended

Part 1: Special maternity leave

4. The proposed Part 1 amendments extend the employer's current obligations by providing that any period of unpaid special maternity leave taken by an eligible employee under section 80 of the FWA will not reduce the employee's entitlement to unpaid parental leave under section 70.

[1] http://ris.finance.gov.au/2013/03/22/prime-ministers-exemption-amendments/

Part 5: Unpaid no safe job leave

5. The Part 5 amendments further extend the employer's obligations by providing the entitlement to transfer to a safe job to all pregnant employees. Section 82A(1) requires the employer to provide unpaid no safe job leave where there is no available safe job and the employee is not entitled to unpaid parental leave. Sections 67(1) and (2) have been amended so that the eligibility rules in that section do not apply to unpaid no safe job leave.

6. Employers will have to provide both paid no safe job leave (for workers eligible for unpaid parental leave) and unpaid no safe job leave (for workers with insufficient service to qualify for unpaid leave under the National Employment Standard (NES) for extended periods). This is in addition to the extension of the period of time spent on unpaid parental leave which will no longer be reduced by any time on special maternity leave.

Part 2: Concurrent parental leave

7. Further employers will have to manage additional complexity, uncertainty and cost with the extension of concurrent leave to eight weeks able to be taken in separate periods of at least two weeks (72(5)(a) and (b)). This complexity will be compounded by the amended notice arrangements for second and subsequent periods of concurrent leave; (74(2); 72(5)(b) and 74(4A).

8. The amendments are opposed and should be rejected for the following reasons:

Extensions to leave

9. These amendments are unwarranted. For most employers, particularly small employers who employ around half the workforce [2], parental leave and special maternity leave, paid or unpaid, is a cost without benefit. It frequently involves payment to another worker to compensate for the

[2] Department of Innovation, Industry, Science and Research Australian Small Business Key Statistics

absence, either as an additional wage or overtime, and additional human resource and administration costs. Many employers have no capacity to provide additional parental leave entitlements and adjustments and in our experience already make adjustments by not filling positions, reorganising work or cutting back on output.

10. In addition to the direct costs of paid leave, the operational and replacement costs of the various forms of parental leave and post parental leave arrangements, where these can be afforded, include:

- recruiting and training replacement employees
- maintenance of temporary position/preservation of absent worker's return to work rights (costs of managing obligations to absent worker can often be difficult and time consuming)
- management and administrative costs
- retraining, re-skilling, mentoring workers on return to work
- additional labour costs from flexible work arrangements on return to work.

No safe job provisions

11. Employers objected to the far more generous provisions for no safe job leave entitlements when they were introduced into the WorkChoices legislation and subsequently into the NES. Employees meeting service requirements can take up to nine months on paid no safe job leave, be absent on unpaid leave for up to 12 months and request a further 12 months leave. These already costly requirements should not be further extended to provide unpaid leave for any employee for whom a safe job is not available.

12. It is an unrealistic assumption that small and medium businesses will have another job to which an employee can be productively transferred and ignores the lost productivity/output costs when trying to secure a replacement temporary employee to fill in for the "risk period".

13. This is again an exercise in cost shifting by government. Such employees should have immediate access to social security benefits. This would be consistent with the International Labour Organisation Convention on Maternity Protection (1952 (ILO C103) revision), which provided that employers should not bear the cost of maternity leave; that this is a cost which should be carried by the community:

> *Article 4. 4. The cash and medical benefits shall be provided either by means of compulsory social insurance or by means of public funds; in either case they shall be provided as a matter of right to all women who comply with the prescribed conditions.*
>
> *Article 4. 8. In no case shall the employer be individually liable for the cost of such benefits due to women employed by him.*

14. CEDAW explicitly includes paid maternity leave as a measure which is required to be introduced by states parties. In discussing the implementation of measures such as paid maternity leave, the CEDAW working party acknowledged the need to limit, as much as possible, measures which discourage employers from hiring women. No reference was therefore made concerning who should bear the costs of paid maternity leave, or how these costs should be calculated.[3]

Concurrent leave and notice provisions

15. The provision of eight weeks concurrent leave was originally proposed by the ACTU when the NES were introduced and rejected. There is no justification for its extension. This provision will subject employers to the challenges of managing the absence of an employee for up to eight weeks, or for short periods of two weeks or more, capable of extension with little or no notice. It can be impossible to get a substitute employee for the current shorter period, let alone eight weeks. This leave is in addition to annual and carers' leave entitlements which could extend the total period of leave to 14 weeks. Where the worker's skills are in demand, replacement problems are exacerbated. There has been no consideration of how businesses, particularly small businesses, are to function with these additional constraints.

[3] Australian Human Rights Commission Valuing Parenthood Chapter 3 International Obligations

16. In a small business, a single employee can account for 20% to 50% of staff turnover. In a medium-sized business, an employee can occupy a pivotal position in the workforce, or in relation to a particular job or project. These entitlements are triggered by circumstances over which the employer has no control -- the pregnancy of the worker or their partner. Workers and employers should be able to make arrangements if they choose, without increasing statutory entitlements.

Part 3: Right to request flexible work arrangements and reasonable business grounds

Right to request flexible work arrangements

17. Part 3 of Schedule 1 amends provisions of the FWA concerning requests for flexible working arrangements by extending the right to request to a considerably expanded range of caring and other circumstances.

18. In addition to those with school aged children, employees with any caring responsibilities, a disability, who are older than 55 or who are experiencing family violence (or whose immediate family or household member is experiencing family violence) may request changed work arrangements. These new categories add a substantial layer of regulation and complexity to management of the workplace and will increase labour and administrative costs. Employers are widely opposed to the assumption that they should bear the costs of provision of unpaid care work. Additionally, despite the greatly expanded categories of workers able to make requests, no change has been made to the time in which the employer is to provide their written response.

19. Disability, family and violence are not defined and their interpretation will create opportunity for dispute at the workplace. Further, the expanded right to request widens employer exposure to litigation through adverse action and discrimination claims.

20. Provisions such as these reflect the Government view that:

- employers do not willingly accommodate employee needs;
- the workplace must be tightly regulated to provide remedies for non workplace needs; and
- employers are required to assume the costs and responsibility for an ever widening range of social issues.

21. The amendments also ignore the numerous submissions made by employer bodies to the FWA Review Panel arguing for reforms to Individual Flexibility Arrangement provisions in order to achieve actual flexibility in work arrangements for both workers and employers.

Reasonable business grounds

22. Part 3 of Schedule 1 also inserts a non-exhaustive list of what might constitute 'reasonable business grounds' for the purposes of refusing a request under the Part.

23. This amendment belies the Government's portrayal of flexible working arrangements as a process of discussion and accommodation between workers and employers. The Government's view of what is reasonable for employers is expressed in highly limiting terms – "*excessive cost"; "no capacity"; "significant loss"; "significant negative impact*" which set a high bar for employers to meet. The NES should not provide any form of definition on what constitutes 'reasonable business grounds'. These provisions set the standard for what the Government thinks is reasonable without any attention to the increasingly difficult conditions under which most Australian businesses operate. The changes proposed are not concerned with what is workable or efficient. Business already has to manage with very high labour costs which the proposed amendments will further increase.

24. Indeed by casting 'reasonable business grounds' in such a way the Government is committing employers to extra cost along with less efficiency, productivity and customer service.

Part 4 of Schedule 1: Consultation about changes to rosters or working hours

25. New section 145A and amended paragraph 205 require modern awards and agreements to have terms which will:

(a) require employers to consult employees about a change to their regular roster or ordinary hours of work; and

(b) allows for the representation of those employees for the purposes of that consultation.

26. The employer must:

- provide information to the employees about the change
- invite employees to give their views on the impact of change including any impact in relation to their family or caring responsibilities
- consider any views about the impact of the change that are given by the employees.

27. Dispute resolution provisions will apply to these consultation requirements with compliance enforceable by application to the Fair Work Commission (FWC).

28. The proposed changes are expressly "*intended to ensure employers cannot unilaterally make changes that adversely impact employees without consulting on the change and considering the impact of those changes on employees' family and caring responsibilities"*.[4]

29. More accurately, the effect of changes is in direct conflict with the agreed provisions in contracts of employment and the well established and considered provisions in awards and agreements on hours of work, rosters and notice requirements designed to reflect the needs in a specific industry or enterprise. When an employee accepts an offer of employment, they agree to the terms of that employment, which in many industries and occupations require changes to the hours they work.

[4] Explanatory Memorandum para 45

30. Hours of work and notice requirements were considered during the award modernisation process, during which the AIRC generally adopted the view that modern award provisions should reflect the existing award entitlements applying to the bulk of employees in the relevant industry or occupation.

31. The issue of consultation itself and the matters on which consultation is required was also considered in award modernisation for the purposes of formulating a standard clause to be inserted in modern awards.[5] The AIRC decided on a standard clause which "*in almost identical terms appeared in most of the Commission's awards for many years and no issue of substance was raised with us concerning its operation during that period*".[6] The effect of the proposed amendments will be to elevate the requirement to consult on these matters to a level equivalent to consultation of the effect of technological change on job security.

32. Award provisions have been settled taking into account the specific requirements of the industry or occupation covered by the award. Awards and agreements stipulate the arrangement of ordinary hours, the spread of hours, overtime, shift arrangements and payment. Where work is done out of ordinary hours or in circumstances identified by the award as attracting a penalty, the worker is paid higher rates i.e. they are already compensated for the departure from ordinary hours.

33. Awards and agreements typically provide for rosters and hours to be alterable by mutual consent or within a stipulated period of notice and are subject to dispute resolution provisions. The insertion of consultation provisions will potentially be in conflict with current obligations, or render them unworkable.

34. For example the *Building and Construction General On-site Award 2012* provides that an employee must be given at least 48 hours notice of the requirement to work shift. [7] It is unlikely that employers will be able to comply with the proposed consultation requirements when needing to introduce shift work within this time frame. In any event, employees will

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[5] [2008] AIRCFB 717; [2008]AIRCFB 1000.

[6] [2008]AIRCFB 1000 para 41.

[7] Clause 34.1(f)

now be able to claim that their views were not properly considered or that their family/caring responsibilities are adversely affected and notify a dispute. Similarly, agreed changes to start times and arrangements for working on rostered days off will be subject to the same effects.

35. The deleterious effect of the amendments on workplace relations and efficiency is demonstrated in the following example:

> ***Restaurant Industry Award 2010***
> ***31.6 Roster***
>
> *(b) The roster will be alterable by mutual consent at any time or by amendment of the roster on seven days' notice. Where practicable, two weeks' notice of rostered day or days off should be given provided that the days off may be changed by mutual consent or through sickness or other cause over which the employer has no control.*

36. An employer will now be required to consult with workers — and their representatives — on their views of the family/caring effects of changing hours which is in potential conflict with their ability to amend rosters on seven day's notice. The worker may notify a dispute that their views where not properly considered and/or their family/carer responsibilities preclude any such roster change. These provisions will be unworkable and will be particularly damaging in industries where changing demand patterns (or even equipment failure etc) necessitate frequent or urgent changes to rostered hours. They will generate another avenue for workplace dispute, the involvement of unions and the FWC.

37. Similarly employers have long been able to change part time workers' hours by agreement. This time consuming and unnecessary procedure will have be undertaken in order to do this and comply with the requirements of the FWA.

38. Underlying award provisions, workers are further protected by Section 62 of the FWA which provides for maximum weekly hours of 38 hours for full-time employees unless additional hours are reasonable. Employees may refuse to work additional hours if they are unreasonable under s62(2). Section 62(3) provides a list of 10 matters to be considered in determining

whether additional hours are reasonable or unreasonable including 62(3)(b) the employee's personal circumstances including family responsibilities.

39. Business performance will be further hampered by this unproductive impractical regulation, again reflecting the Government's view that employers must be forced to incorporate family and caring considerations into the management of their operations. Mandating these procedures is the outcome of the Government's view that employers are inherently opposed to considering the welfare and wellbeing of their workers and must be closely regulated to engender social change. Apart from ignoring the adjustments employers routinely make to accommodate worker needs and fit these with what is actually required to run a competitive business in the private sector, it assumes business can viably assume the costs of worker family/carer responsibilities.

SCHEDULE 2 – THE MODERN AWARDS OBJECTIVE

40. New paragraph 134(1)(da) amends the Modern Awards Objective so that the FWC must take into account the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

41. The Explanatory Memorandum provides no explanation or rationale for these amendments. The second reading speech refers to need to ensure that work at hours which are not "family friendly" is fairly remunerated.

42. The amendments are opposed and should be rejected for the following reasons:

43. The proposed amendment is inconsistent with the Modern Awards Objective to provide a fair and relevant safety net of minimum terms and conditions,

having regard to general principles but without reference to specific terms of employment.

44. The Explanatory Memorandum of the *Fair Work Bill 2008* clearly demonstrates that this lack of reference to specific terms of employment in the Modern Awards Objective was intended by Parliament to ensure that when exercising its modern award functions, the FWC would not be unreasonably constrained. For example, in paragraph 518 it was noted:

> *In ensuring that the minimum safety net of terms and conditions is relevant, it is anticipated that FWA will take account of changes in community standards and expectations, and that the terms and conditions will be tailored (as appropriate) to the specific industry or occupation covered by the award.*

45. The desire to keep separate what may be included in modern awards, as opposed to what must be considered by FWC in setting, varying or revoking modern awards, is further demonstrated by s139 of the FWA which governs the terms that may (not must or "needs to") be included in modern awards. This section already provides a modern award may include terms relating to:

> **...**
> *(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;*
> *(d) overtime rates;*
> *(e) penalty rates, including for any of the following:*
> *(i) employees working unsocial, irregular or unpredictable hours;*
> *(ii) employees working on weekends or public holidays;*
> *(iii) shift workers;*

46. By separating specific provisions about what may be included in a modern award and the matters of general principle that must be balanced in proceedings affecting them, the FWA maintains a measure of coherence in the modern award system. If it enacts the proposed amendment the Government will destroy this coherence, unreasonably constrain the FWC and extend a degree of inevitable success to the trade union movement's ongoing campaign of denial against the a reduction in penalty rates where needed in industry and will act as a catalyst for further claims to increase existing or introduce new penalties.

47. The impact of the changes can be demonstrated by the following example:

48. In the *Banking, Finance and Insurance Award 2010* ordinary hours of work may be performed between 8:00 am and 12:00 pm on a Saturday at ordinary rates.

49. If the union brought a claim seeking to introduce a new penalty of 50 per cent of the ordinary rate for each of these hours, how else may FWC reconcile the Modern Awards Objective in such proceedings to have regard for:

> *(e) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;*
>
> ***and***
>
> *(da) the need to provide additional remuneration for: (i) employees working overtime; or (ii) employees working unsocial, irregular or unpredictable hours; or (iii) employees working on weekends or public holidays; or (iv) employees working shifts.*

other than by agreeing to an increase in penalty rates and confining its analysis of employment costs to determining the quantum of increase? In essence, the outcome is predetermined save as to the degree of change.

50. Herein lies the heart of the incoherence that will result if the Modern Awards Objective is amended in this way. At present, none of the considerations required by s134 of the FWA interact in a way to predetermine the outcome of proceedings in which FWC exercises its modern award functions. The amendment will alter this position.

51. It will do so to advance Government's political interests rather than the national economy, in order to effect a promise made by the Prime Minister to the trade union movement on 14 March 2013 that:

> *"We will make it clear in law that there needs to be additional remuneration for employees who work shift work, unsociable, irregular, unpredictable hours or on weekends and public holidays".*[8]

[8] Prime Minister Gillard Keynote Address to ACTU National Community Summit

52. The amendments are unnecessary. Award provisions have long provided additional remuneration for the above circumstances. The modern award process and decisions such as the recent FWC penalty rates and public holiday decisions [9] demonstrate that the FWC faces no impediments in fully considering any of the factors set out in paragraph 134(1)(da) and determining remuneration. The Government itself has pointed to consideration given by the tribunal to the "social disability" associated with working outside of normal spans of hours and on weekends in determining modern awards:

> *The Government notes that during the award modernisation process the AIRC again acknowledged the social disability associated with working outside normal spans of hours and on weekends. For example, in response to a submission in relation to the Restaurant Industry Award that penalty payments should be minimal or non-existent during any periods when restaurants normally trade, including on weekends, the Full Bench concluded that such an approach:*
>
> - ☐ *would ignore the inconvenience and disability associated with work at nights and on weekends;*
> - ☐ *did not reflect any prevailing positions in pre-reform awards and NAPSAs;*
> - ☐ *did not take in account the significance of penalty payments in the take home pay of employees in the restaurant industry;*
> - ☐ *would give the operational requirements of the industry primacy over all the other considerations the Commission was required to take into account; and*
> - ☐ *FWA would therefore require a more balanced approach.* [10]

53. Further, there is no evidence that Australian workers are increasingly working overtime, on weekends or public holidays, shifts or "unsocial" or irregular/ unpredictable hours at a level which would require additional legislative intervention to increase rates of pay. To the contrary, average hours worked data shows a consistent downward trend, there has a decline in full time employment growth compared with part time [11] and over 1.5 million workers now report insufficient hours of work.[12] These are indicators of labour costs being too high instead of a need to increase these costs further.

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[9] [2013] FWCFB 2168;[2013] FWCFB 1635

[10] Australian Government Submission in relation to applications to vary penalty rates in the retail, hospitality, fast food, restaurant and hair and beauty awards (AM2012/8 and others) para 4.2

[11] ABS 6202.0 Labour Force Australia February 2013

[12] ABS 6265.0 Underemployed Workers in Australia September 2012

54. From 2008 to February 2013 the aggregate number of hours worked in Australia have barely changed.[13] The proportion of the workforce (including independent contractors and business operators) working more than 50 hours a week is currently around 17%. Of these, about 60 percent are managers or professionals, typically not covered by awards or the modern award objective.

55. Significantly the proportion of *employees* reporting they work only Monday to Friday increased from 63% 1993 to 69% in 2009.[14] In contrast over 40% of independent contractors and over half of business operators work both weekdays and weekends. Of those employees who usually worked on the weekend, almost two-thirds (65%) were following their preference for working some or all of their hours on the weekend.

56. Despite union and academic protestations about the proliferation of casual or "non secure" work the number of casual workers has grown at a rate lower than that of all employed persons.[15] Only 6% of casuals work weekends only, with half working a mix of weekdays and weekend.[16]

57. The FWA and modern awards have been structured around the notion of "standard" hours employment as the preferred model for regulation, with heavy penalties imposed for work outside "standard" hours. This is has been done in response to the continuing union campaign against non standard work, instead of responding to the changed demands of the community and the operational needs of industry.

58. Significant cost increases have already been imposed on employers in a number of industries through much higher penalty rates (and other inappropriate terms) being inserted into modern awards. As the numerous unsuccessful attempts by employers to remedy these cost imposts through applications to vary modern awards demonstrate; the FWC already has ample capacity to consider the factors set out in paragraph 134(1)(da).

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[13] ABS 6202.0 Labour Force Australia February 2013

[14] ABS 6342.0 Working Time Arrangements 2009 Table 11, ABS 6342.0 Working Time Arrangements 1993 Table 1

[15] ABS 6359.0 Forms of Employment November 2011

[16] op cit

59. The amendment will add to this unbalanced legislative outcome. The ability to seek realistic variations to awards is already constrained by the tests imposed by the FWC in its application of s157 and s134 of the FWA. The result has been that too many modern award provisions represent a great leap backwards into more restrictive, less flexible and more costly arrangements. These regressive changes reflect what unions want but not what the economy needs.

SCHEDULE 3 – ANTI-BULLYING MEASURE

Part 6-4B—Workers bullied at work

60. This Part allows a worker who considers they are being bullied at work to apply to the FWC for an order to stop the alleged bullying.

61. The proposed amendments must be rejected for the following reasons:

62. The amendments assume that third party intervention is necessary to manage how employers meet their legal obligations; that employer – employee relationships are inherently hostile, conflict based and require detailed regulation; and that employer policies, procedures and initiatives to effectively manage their workplace must be subject to close scrutiny, review and supervision. The provisions operate to at the expense of sensible and practical measures to manage worker performance.

63. The amendments will have the effect of heightening workplace tension and act as a disincentive for employers and employees to jointly resolve workplace issues. There are no restraints on making an application for a bullying order. An application can be made irrespective of what measures an employer is taking to address a complaint about bullying. It is clear from the outcomes of the unfair dismissal provisions in the FWA that even where there some limitations, claims have escalated to unprecedented levels and for the last quarter of 2012 were being made at a rate of just under 1,300 per month.[17] Instead of legislative reform to this costly drain on business resources (with most being settled at conciliation with “go away” money

[17] FWC Report http://www.fwc.gov.au/index.cfm?pagename=dismissalsOutcomes#concresult

being paid), the amendments will expose business to yet another avenue of litigation and dispute.

64. This is already an area of extensive regulation. Employers currently face legal action for behaviour categorised as workplace bullying under a wide range of laws including the current provisions of the FWA: criminal, workplace health and safety, anti-discrimination and workers compensation - as well as personal injury liability and breach of contract. Employers are shortly to be regulated also by the onerous and detailed work health safety model Code of Practice developed by Safe Work Australia; *Preventing and Responding to Workplace Bullying.*

65. Importantly, employers have highly specific obligations to comply with work health and safety and discrimination legislation. Where there is an alleged or suspected breach, employers/person in control of a business or undertaking have specific duties to investigate and where necessary take remedial action in order to comply. These amendments will subject employers to the involvement of the FWC in the compliance process and enable the FWC to make orders affecting compliance actions under legislation other than the FWA.

66. The definition of "worker" is taken from the *Work Health and Safety Act 2011* (Cth) and extends to any person who carries out work in any capacity for a person conducting a business or undertaking. The definition extends beyond that of an employee and exposes employers to applications for FWC orders by people other than employees. Employers may be caught up in applications involving workers whose work they do not direct, supervise or control and which may involve alleged bullying by persons who are not their employees – including customers, clients, students etc.

67. The Explanatory Memorandum notes that orders will not be limited to employers and will also apply to visitors to the workplace. The orders could also be based on behaviour such as threats made outside the workplace if the threats relate to work.[18] It is difficult to envisage how employers are to manage such orders - which may well require the separation of employees,

[18] Explanatory Memorandum para 118.

restraint on access to certain locations, venues, restrictions on communication etc.

68. The amendments provide that a workers is bullied at work if "*repeated unreasonable behaviour*" creates a risk to the worker's health and safety. (section 789FD(1)). The terms are not defined in the legislation however the Explanatory Memorandum notes that this is not limited to behaviour that is victimising, humiliating, intimidating or threatening. What concerns employers is the breadth of this definition which allows a limitless range of actions and behaviour to be construed as bullying by workers. This is where the regulatory difficulty lies.

69. Work Health Safety regulator guidance material and codes on bullying is consistent across the jurisdictions on what constitutes bullying. According to this material it includes:

- unreasonably overloading a person with work or not providing enough work
- setting timelines that are difficult to achieve or constantly changing deadlines
- setting tasks that are unreasonably below or beyond a person's skill level
- deliberately excluding, isolating or marginalising a person from normal work activities
- withholding information that is vital for effective work performance
- deliberately denying access to information, consultation or resources
- deliberately changing work arrangements, such as rosters and leave, to inconvenience a particular worker or workers, or
- unfair treatment in relation to accessing workplace entitlements such as leave or training.

70. Similarly, Work Health Safety regulator guidance materials consistently identify the following as "risk factors":

- organisational culture and change (change in supervisor/manager; significant technological change; restructuring; downsizing; change in work method/s; outsourcing)

- leadership styles (e g autocratic or laissez faire)
- systems of work (how work is organised, scheduled and managed)
- workplace relationships, and workforce characteristics.[19]

71. Clearly each of these matters can be matters of individual perception and interpretation. As a consequence of this regulatory approach it is open to any worker to construe themselves as repeatedly and deliberately over or underworked, required to undertake tasks they don't like; subjected to continual change, having an incompatible boss or colleague or denied access to resources and thus subject to bullying.

72. A recent case demonstrates this outcome. The tribunal did not rule on the question of whether the employee was *actually* bullied, but accepted that she *perceived* that "[the manager] was bullying, obstructing and harassing her" at a time when changes to her workplace environment and duties were causing her stress:

> *On the present evidence, I am not able to determine with certainty whether her perceptions are correct, nor am I comfortably able to rule out the possibility.*

73. The tribunal found her psychological disorder was caused and aggravated by her employer's reasonable decision to change group managers, postpone a project undertaken by the worker, move tasks performed by the worker to another office, and offer her alternative duties. [20]

74. Reasonable management actions carried out in a reasonable manner are to be excluded (subsection 789FD(2)). However, this will not prevent a worker from bringing a bullying application. The reasonableness or otherwise of the management by the employer will be examined by the FWC to determine whether bullying has occurred. The Explanatory Memorandum states that management actions are not considered to be bullying if *they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the* ***individual feeling (for example) victimised***

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[19] For example WorkCover NSW Bullying Risk Indicator accessed 19 June 2012 http://www.workcover.nsw.gov.au/formspublications/publications/Documents/bullying_risk_indicator_2236.pdf

[20] Fox and Comcare [2012] AATA 204 (5 April 2012)

or humiliated [21] *(emphasis added).* However, the above case illustrates the significance of individual perception in these claims.

75. Employers are generally extremely cautious when undertaking performance management given the high probability of a costly workers compensation claim being made for "stress" (now generally described as an anxiety disorder), a claim for harassment or an adverse action claim. With the additional avenue of complaint provided by the amendments, effective workplace management of problem employees is even more severely constrained.

76. These amendments are not a replacement for penalties enforceable under WHS and criminal legislation and are not intended to preclude investigation and prosecutions under WHS and criminal law. Further, making a bullying complaint to the FWC will constitute exercising a 'workplace right' by an employee for the purposes of the adverse action provisions of the FWA. An employee may make both an adverse action application and bullying application, in addition to seeking redress under other legislation. (Section 115). Workers are readily utilising these provisions in circumstances where bullying or harassment allegations are made.[22]

77. An employee can lodge a claim with the FWC at the same time as informing employer that they consider they are subject to bullying. Any investigation, remedial measures etc instigated by the employer on their own initiative will now be subject to the review and control of the FWC. The tribunal can

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[21] Explanatory Memorandum para 112

[22] Stevenson v Airservices Australia [2012] FMCA 55; Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd [2011] FCA 333;Cugura v Frankston City Council [2012] FMCA 340; Ratnayake v Greenwood Manor Pty Ltd [2012] FMCA 350;Jones v Queensland Tertiary Admissions Centre Ltd (No 2) [2010] FCA 399;Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2012] FCA 563; McCulloch v Preshil, The Margaret Lyttle Memorial School [2011] FCA 1218;

Ramos v Good Samaritan Industries (No 2) [2011] FMCA 341; Dr Dimitri Gramotnev v Queensland University of Technology [2010] FWA 6237;Nicole Lord v WorkSafe Victoria [2012] FWA 4569;Ms Lauren Hansen v Apex Cleaning & Polishing Supplies Pty Ltd T/A Apex Cleaning Supplies [2011] FWA 1566;Miss Melissa Kerr v Ballarat Truck Centre Pty Ltd [2011] FWA 3894; Leza Howie v Norilsk Nickel Australia Pty Ltd; Dmitry Lafitskiy; Dennis Fulling; Roman Panov; Dmitry Kondratiev; and Edwin Leeuwin [2012] FWA 2853; Tammy Sparkes v Chubb Fire and Security Pty Ltd [2012] FWA 5204;

Zhan Gao v Department of Human Services [2011] FWA 8072;

Belinda Mosterd v Mega Pet Warehouse Pty Ltd T/A Mega Pet Warehouse Pty Ltd [2012] FWA 2722; Ms Louise Elliot v Grace Wakeman Family Trust Pty Ltd t/as Williamstown; Newsagency and General Store [2012] FWA 2328; Mr David Tse v Ready Workforce (A division of Chandler Macleod) Pty Limited [2010] FWA 8751;Ms Brittany-Jaymes Samson-Anand Anbardan v Trimatic Contract Services Pty Ltd [2012] FWA 3295;National Tertiary Education Industry Union v University of South Australia [2011] FWAFB 1103

require submissions, documents, records or other information; require a person to attend before it; take evidence under oath; conduct an inquiry; conduct a conference; or hold a hearing. Any employer actions will be subject to these proceedings, an outcome which cannot be described as focussed on *"resolving the matter and enabling normal working relationships to resume"*[23]

SCHEDULE 4 – RIGHT OF ENTRY

78. Section 492 will provide that where a permit holder and an occupier cannot agree on the room or area of the premises, the interview or discussion is to be held in the room/area provided for the purpose of taking meal or other breaks.

79. This stipulation is unwarranted and intrusive. Section 492(1) of the FWA provides that a permit holder must comply with any reasonable request by the occupier of a premises to conduct interviews or hold discussions in a particular room or area of the premises. Section 492(2) sets out the circumstances where a request will be unreasonable, including:

- where the room or area is not fit for the purpose of conducting the interviews or holding the discussions
- where the request is intended to intimidate persons who might participate in discussions
- where the request is intended to discourage persons from participating in discussions or
- where the request is intended to make it difficult for employees to participate in discussions because the room or area is not easily accessible, or for some other reason.

80. The FWC is empowered to deal with a dispute about whether a room or area is reasonable.[24] This issue was considered in detail by the FWA Review Panel which did not recommended that unions be given automatic access to areas used for lunch or meal breaks despite detailed union submissions

[23] Explanatory Memorandum para 119.

[24] S 937

pressing for this explicit change. Instead the panel recommended that the FWC be:

> *"given greater power to resolve disputes about the location for interviews and discussions in a way that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience.*[25]

81. The effect of this amendment will be subject any employee on a break in the area chosen by the union official, including those who do not wish to participate, to be exposed to union activities and recruitment campaigns. This is expressly contrary to the view enunciated by the Full Bench in *Sommerville Retail Services Pty Ltd v Australasian Meat Industry Employees' Union* to ensure that the privacy of individuals eating their lunch was not disturbed.[26] Instead of enhancing the individual's right to privacy (as required by Australia's obligations under the *International Covenant on Civil and Political Rights)* the Australian government is assisting unions to bolster their dwindling private sector membership levels which have been in long term decline and reportedly around 13% in 2011. [27]

Accommodation and travel arrangements for permit holders in remote areas

82. Under new section 521C an occupier will be obliged to enter into accommodation and transport arrangements with a permit holder where accommodation or transport is not reasonably available unless provided by the occupier.

83. New section 505 allows the FWC to deal with accommodation and transport arrangements disputes and rule on matters such as whether accommodation or transport is reasonably available, if its provision will cause undue inconvenience for the employer and any charges made by the employer for cost recovery.

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[25] Fair Work Act Review Panel Recommendation 36

[26] [2011] FWAFB 120. See also *Australasian Meat Industry Employees' Union v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847; *Transport Workers' Union of Australia - New South Wales Branch v DHL Supply Chain (Australia) Pty Limited* [2011] FWAFB 3376.

[27] ABS 6310.0 Employee Earnings Benefits And Trade Union Membership August 2011

84. These amendments are intended to provide union access to remote sites at the employer's expense and should be rejected. Apart from the issue of inappropriate access to sites where entry is restricted to personnel who are trained, supervised and insured (for example offshore drilling rigs and helicopter travel) unions will continually dispute those matters now available under the legislation – whether the accommodation /transport is reasonably available; inconvenience to occupier; reasonable period for request and the cost of accommodation and travel. Again this is an unwarranted cost impost on employers and a benefit for unions which further contributes to the unbalanced provisions of the FWA.

Frequency of Entry Dispute Settlement Powers

85. Proposed s505A enables the FWC to deal with a dispute regarding the frequency of entry to hold discussions. The FWC is able to deal with the dispute if a permit holder or permit holders from the same organisation enter under s484 and the employer or occupier of the premises disputes the frequency of the entry. FWC may only make an order if it is satisfied that the frequency of entry requires an unreasonable diversion of the occupier's critical resources per proposed s505AC(4).

86. While employers are appreciative that this issue has been recognised as requiring attention, the proposed solution is problematic. The term "critical resources" indicates this will be stringent test for employers to meet and one likely to be subject to dispute. For this reason the wording of the proposed amendment should be altered to provide a more balanced outcome which is likely to provide a workable result.