Australian Meat Industry Council

The Senate

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

Fair Work Amendment Bill 2013

Submission of Australian Meat Industry Council

A. SUMMARY

The *Fair Work Amendment Bill* 2013 (*the Bill*) seeks to amend the *Fair Work Act* 2009 (*the Act*) in a number of critical areas.

The Bill seeks to amend s 492 of the Act. Section 492 is contained in Part 3-4 of Division 2 of Chapter 3 of the Act and deals with right of entry provisions for permit holders entering work premises.

This short submission addresses the proposed amendment to s 492 and any related amendments (for example s 505).

Relevantly, s 484 of the Act provides that permit holders may enter work premises during breaks to have discussions with employees who wish to participate in those discussions. Section 490(2) provides that discussions under s 484 may be held only during mealtimes or other breaks. Section 492(1) of the Act states that permit holders must comply with any reasonable request by the occupier to conduct interviews or hold discussions in a particular room or area. Section 492(2) provides for matters to be considered in deciding whether an occupier's request is unreasonable. Section 505 gives the Fair Work Commission (FWC) the power to deal with and, resolve disputes.

The proposed amendment to s 492 (and related amendments) has the extraordinary result of inserting into legislation a near unfettered right to permit holders to enter meal areas or meal rooms of occupiers/employers where employees congregate during breaks. That unfettered right has never been in federal workplace/industrial legislation dating back as far as 1904.

Further, as will be emphasised, the FWC – the independent umpire - will be given no direct power in relation to s 492 if the Bill becomes law. FWC will not be given any power to resolve any location disputes in respect of the proposed s 492 and the place for discussions. FWC will be given a token power in a proposed s 492A (the route to be taken to get to the meal area or meal room) but not s 492. The token power is meaningless given the width of the proposed s 492.

With the repeal of s 492 and s 505(1) the Bill contains further token amendments specifically giving FWC the power to deal with disputes relating to frequency of visits to work places by permit holders and any supposed 'misuse' of rights by permit holders. But FWC's power extends to these rights under the present legislation.

The gravity of the Bill is that employees or occupiers (and other employers with employees at the workplace) will have the provisions of the proposed s 492 thrust down their throat irrespective and without any arbitral rights.

With respect, AMIC submits that the amendment to s 492 is a deliberate attempt to severely enhance the power of union officials when entering premises. There can be no other conclusion other then the Bill, in respect of s 492, is to grant rights to union permit holders in the face of declining trade union relevance and to satisfy the long term paranoia of trade union permit holders (and presumably the government) over access to meal areas or meal rooms. One would have expected the proposed s 492 to appear in legislation last century, not this century.

Perhaps, facetiously, the government can also legislate for every other door salesperson visiting the offices of a corporation or business to be granted unfettered rights of access into the meal room or meal area.

It cannot be denied that right of entry provisions contained in legislation have, over time, been the subject of disputes before successive tribunals. However, as has been noted in a recent court decision, the present sections 484 and 492 '…..reflect the balance sought to be struck by the Legislature between the common law rights of an occupier and the rights of entry necessary to promote the objects of Part 3-4….": see *AMIEU v Fair Work Australia* [2012] FCAFC 85 and the judgement of Flick J at 59.

The government's method to end any debate and balance about location for interviews or discussions by permit holders is to negate any common law rights from legislation and mandate the meal area or meal room irrespective of what may be the wishes of the majority of employees utilising the room or area as well as not protecting any undue interference caused to the occupier.

B. THE AUSTRALIAN MEAT INDUSTRY COUNCIL (the AMIC)

The AMIC is registered as an organisation of employers pursuant to the provisions of the Fair Work (Registered Organisations) Act 2009. It has been registered as an employer organisation under federal legislation since 1928.

The AMIC represents a multitude of employers in or in connection with all sectors of the meat industry across Australia. It is the peak meat industry body in Australia. The meat industry employs in excess of 60,000 persons in all states of Australia. The width of the industry (and the AMIC membership) covers processing, production, transport, packing, storage, clerical and administrative, retail, wholesale, export, agricultural and others.

The AMIC represents some of the largest entities in or in connection with the meat industry with thousands of employees as well as many entities that come within the definition of a 'small business' employer under the Act.

The AMIC services its members by, inter alia, representing them in courts and tribunals across Australia. Regularly, we are called upon to advise members in relation to issues including disputes concerning right of entry. Those within the AMIC involved in compiling this submission have had experience in right of entry matters under previous federal legislation (meaning the federal legislation of 1904 – 1987, 1988, 1996, 1996 amending act and 2009).

The reason for the AMIC's existence is to represent members. When called upon, we do so.

There are members of the AMIC (and employees of those members) who, historically, raise no objection to union permit holders entering premises during breaks and proceeding to the meat rooms or meal areas for interviews or discussions. There are other members – and this would be the majority in our view - who wish to adhere to the views of their employees and, in doing so, direct the permit holder to an appropriate room where employees are free to be interviewed or enter into discussions without interference.

The AMIC has represented members in many arbitral proceedings pursuant to the right of entry disputes over many years. Under the Act, where matters have been the subject of

decisions by FWC and courts, the attitude of some union permit holder is usually, inferentially, ‘lunch room or nothing’ irrespective of the present s 492: see *AMIEU v Fair Work Australia* [2012] FCAFC 85 and the judgement of Flick J at 80; *AMIEU v Goodchild Pty Ltd* [2011] FWA 8228 at 54 to 62.

It appears to the AMIC that the government agrees with the said attitude of the union permit holders.

C. THE PRESENT s 492 AND s 505 IN THE ACT

We referred in the summary above to the right of permit holders to enter premises for the purposes of holding discussions with employees. Section 484 of the Act is not at issue. We do need to fully set out s 492 and s 505 of the Act. We emphasise key provisions. The sections read as follows:

'SECT 492

Conduct of interviews in particular room etc.

(1) The permit holder must comply with any reasonable request by the occupier of the premises to:

(a) conduct interviews or hold discussions in a particular room or area of the premises; or

(b) take a particular route to reach a particular room or area of the premises.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

(2) Without limiting when a request under subsection (1) might otherwise be unreasonable, a request under paragraph (1)(a) is unreasonable if:

(a) the room or area is not fit for the purpose of conducting the interviews or holding the discussions; or

(b) the request is made with the intention of:

(i) intimidating persons who might participate in the interviews or discussions; or

(ii) discouraging persons from participating in the interviews or discussions; or

(iii) making it difficult for persons to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason.

(3) However, a request under subsection (1) is not unreasonable only because the room, area or route is not that which the permit holder would have chosen.

(4) The regulations may prescribe circumstances in which a request under subsection (1) is or is not reasonable.

'SECT 505

(1) The FWC may deal with a dispute about the operation of this Part (including a dispute about whether a request under section 491, 492 or 499 is reasonable).

Note: Section 491, 492 and 499 deal with requests for permit holders to use particular rooms or areas, and comply with occupational health and safety requirements.

(2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order imposing conditions on an entry permit;

(b) an order suspending an entry permit;

(c) an order revoking an entry permit;

(d) an order about the future issue of entry permits to one or more persons;

(e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by

making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with the dispute:

(a) on its own initiative; or

(b) on application by any of the following to whom the dispute relates:

(i) a permit holder;

(ii) a permit holder's organisation

(iii) an employer's;

(iv) an occupier of premises.

(4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

(5) In dealing with the dispute, the FWC must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2 or 3 of this Part, unless the dispute is about whether a request under section 491, 492 or 499 is reasonable…."

(our emphasis)

We emphasise from the above extracted sections the following:

a) The present scheme, as outlined earlier in an extract from a Federal Court decision, is deemed to create a balance between permit holders and the occupier;

b) The right of entry under the scheme is not given for the purpose of holding discussion with employees generally. Nor is there an absolute right given such that employees

must be able to receive information from the union's permit holder: see *AMIEU v Fair Work Australia* [2012] FCAFC 85 and the judgement of Jessup J at 16-17;

c) FWC in dealing with disputes, under the present scheme, is able to take into account the interests of those employees who do not wish to participate in discussions with the permit holder: see *AMIEU v Fair Work Australia* [2012] FCAFC 85 and the judgement of Jessup J at 26; *Somerville v AMIEU* [2011] FWAFB 120 at 54; AMIEU v Goodchild Pty Ltd [2011] FWA 8228 at 71-72.

d) If all the relevant employees or a substantial majority of those employees do not wish to be exposed to discussions with the permit holders then that is a relevant consideration under the present scheme.

e) There are situations where is it not practicable for employees who did not wish to be exposed to such discussions with permit holders to have their meals elsewhere, especially in production or processing type operations. This is a relevant consideration for FWC in any dispute under the present scheme.

f) If, under the present scheme, the occupier proposes a particular room or area for discussions with the permit holder, the present scheme provides that the request must be reasonable and s 505 provides ample discretion for FWC to deal with an ensuing dispute.

D. THE BILL CONCERNING s 492 AND s 505

We can then turn to the Bill. It seeks a complete repeal of the present s 492 in its entirety and the insertion in lieu thereof the following:

'492 Location of interviews and discussions

(1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.

(2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.

(3) The permit holder may conduct the interview or hold the discussions in any room or area:

(a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and

(b) that is provided by the occupier for the purpose of taking meal or other breaks.

Note 1:
The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused.

Note 2:
A person must not intentionally hinder or obstruct a permit holder exercising rights under this section (see section 502).

492A Route to location of interview and discussions

(1) The permit holder must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premises determined under section 492.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1).

(2) A request under subsection (1) is not unreasonable only because the route is not that which the permit holder would have chosen.

(3) The regulations may prescribe circumstances in which a request under subsection (1) is or not reasonable.'

(our emphasis)

Section 505 is amended by the Bill by repealing s 505(1) entirely. The Bill seeks to insert in lieu thereof as follows (and we only need set out parts of the proposed s 505 as is relevant here for this submission):

'Sect 505

(1) The FWC may deal with a dispute about the operation of this Part, including a dispute about:

(a) Whether a request under section 491, 492A or 499 is reasonable; or…..'

(our emphasis)

The first comment is commonsense and dictates that no permit holder would agree to hold discussions with employees other than in the meal room or meal area. This is irrespective as to whether a more appropriate room or area was suggested and offered by the occupier. Any reasonable person who thinks otherwise should study the evidence led in arbitral proceedings and appeals.

A reading of the above parts of the Bill must mean that, if they become law, the whole of the present balance under the scheme will be eradicated and compromised which obviously is the intention of the government.
Rights of employees who do not wish to be exposed to discussions will evaporate. Rights of occupiers will evaporate in relation to location.

Permit holders will be given rights never before bestowed.

FWC will be left powerless to resolve disputes concerning access to the meal room or meal area of a workplace, irrespective of the views of the employees or the occupier. The proposed s 492 is intentionally removed from the proposed s 505(1)(a) which deals with FWC dispute powers.

There can be no other conclusion as to the intention of the government.

We state the above irrespective that FWC is given power in relation to so-called ‘misuse’ of permit rights in the Note to s 492. The wording is so ambiguous and vague it will give rise to unnecessary disputes within the meal rooms or meal areas. The wording explicitly excludes the rights of employees or a substantial majority of the employees or rights of the occupier.
In a bizarre twist, the government has continues with sections 491 and 499 into the proposed s 505(1) but omits s 492 whereas in the Act all three sections appear.

E. EXPLANATORY MEMORANDUM

The Explanatory Memorandum Outline refers to the Panel commissioned by the government to review the Act. It states that the Bill '*implements several of the Panel's recommendations and a number of reforms which reflect the government's policy priorities…*'.

One issue is whether one is able to conclude the present Bill, so far as s 492 and s 505(1)(a) concerns, a recommendation of the Panel or a policy priority.

The Explanatory Memorandum states the Bill was developed following extensive discussions with stakeholders. AMIC would not know of one employer organisation that would echo sentiments in favour of the proposed s.492 or s 505(1)(a) of the Bill.

We assume 'extensive discussions' for this government probably means 'we have explained it so take it and enjoy it' like many of the other policy decisions over recent years. This was a favourite tactic of the Labor governments of Queensland and New South Wales before meeting their fate.

G. THE FAIR WORK ACT REVIEW REPORT

Let us then deal with this Panel Report and see what was recommended in relation to s.492 and s.505 of the Act and location for discussion issues.

The Report discusses *Location of Discussion* issues at 8.4 including referencing some decisions of Fair Work Australia in relation to disputes on right of entry location. We have referred to some of those decisions (and others) in this submission.

The Panel recommended that:

> *'s.492 and s.505 be amended to provide FWA with 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 the workplace and the right of occupiers and employers to go about their business without undue inconvenience.'(*Recommendation 36*)*

However, the Panel in making the recommendation concluded that:

> *'…We consider that the FW Act could better meet its (right of entry) objective by providing greater discretion to FWA to determine a reasonable location for interviews and discussions.'* (see page 197)

The Government's reaction to the Panel's recommendation has been to remove s 492 from the jurisdiction of FWC under the proposed s 505(1) to deal with disputes the location issue. It is the meal room or meal area for permit holders according to this government – end of story. Rather than giving FWC greater discretion, the government has excluded FWC from any involvement.

Further, we take issue with the way the Panel framed the recommendation extracted above. In many workplaces, where unions have little or no membership, the employees themselves should have a right to be involved as to whether (for example in a confined meal area) they wish to be disturbed by travelling salespersons.

It may be that the Act states a permit holder can only hold discussions with persons who wish to have discussions but the evidence in the cases cited by the Panel (and in other cases referred to herein) is that the presence of a permit holder will disturb the freedom of employees who do not wish to be disturbed in the meal room or meal area. It is only commonsense. The Panel recommendation should have referred to the interests of employees who did not wish to be disturbed.

In this respect, we refer to the dicta of Jessup J in *AMIEU v Fair Work Australia* [2012] FCAFC 85 at 26:

> *'….The Union's third ground was that the majority had erred in point of jurisdiction because they found, in the absence of evidence, that there were employees of Sommerville who did not wish to participate in discussions with Mr Ross. In my opinion, the majority made no such finding. Their relevant observations were, first, that, if the permit holders sought to conduct meetings of members in the lunch room, then others who did not wish to participate in those meetings would be inconvenienced; and, secondly, that Sommerville had given as a reason for not permitting access to the lunch room a concern as to the inconvenience that might be visited upon those other employees. In neither of these respects did the conclusion of the majority depend upon evidence as to the extent, if any, to which there were employees who did not wish to participate in discussions. Rather, the majority's point of reference was s 484(c) of the Act itself, which confined the right of entry to a situation in which the discussions would be with employees who wished to participate in them. It did not need evidence for the majority to reason, following the Act, that there were presumptively two classes of employees: those who wished to participate, and those who did not. FWA is, of course, a tribunal with specialised knowledge, a circumstance which comes significantly into play when a "no evidence" point of this kind is made. The purpose of the lunch room being given by its name, it was amply within the scope of the majority's jurisdiction under the Act to take into account the interests of those who did not wish to participate. There is, in my view, nothing in the Union's third ground…'*

The Panel gave little recognition to this obvious interest though they cited the decision.

We repeat - AMIC has employer members who raise no objection to a permit holder freely entering the meal area or meal rooms during breaks, even in situations where work has ceased for the day (because there are situations where the meal room is adjacent to locker areas). The interests of other employees and occupiers are now to be completely disregarded.

H. HISTORICAL ASPECTS CONCERNING RIGHT OF ENTRY

Earlier in this submission we commented that nothing remotely like the proposed amendments to s.492 or s 505 have ever existed in previous federal industrial/workplace legislation.

The government has ignored this history. The terms of reference of the Panel reviewing the Act did not appear to cover the historical aspect of right of entry provisions.

The 1904 Conciliation & Arbitration Act (as amended) and the 1988 Industrial Relations Act were founded upon the settlement of dispute power within s.51 of the Constitution. There were rights to inspect work premises in the respective acts and the power to inspect and/or interview etc was limited to the reasons set out in the sections.

Over and above the right to inspect, awards could contain right of entry provisions. However, the Tribunals were given the power to insert right of entry provisions into each award and the power to settle right of entry disputes. Neither the 1904 nor 1988 Act provided union officials with a specific right to enter meal rooms for the purpose of having discussions.

The Workplace Relations Act 1996 implemented a new statutory right of entry scheme compared to the previous legislation and was based upon the Corporations power. Permits were issued and union officials needed a valid permit to enter workplaces where members of the union worked if they wished to investigate suspected breaches of the Act or an award/ certified agreement binding the relevant union. Union officials, again with a valid permit, were now also permitted to enter work premises, where work covered by an award binding on the union was being carried out, for the purpose of holding discussions during breaks.

The 1996 legislation was silent on where discussions could take place but there were various decisions of the *Australian industrial Relations Commission* (AIRC) in the period 1996 to 2008 that did restrict permit holders access to meal or lunch rooms. Further, if no award or certified agreement applied the union official was denied access. Indeed, if the workforce were signed to Australian Workplace Agreements (AWA's) the union officials was denied access not just to the lunchroom but the worksite because the relevant award was ousted.

The Act (2009) primarily continued the discussion scheme that was under the repealed 1996 legislation without the strictures of binding awards/agreements being a condition precedent to gaining entry. However, the 2009 legislation added s 492(2) which provided some guidance as to whether a location proposed by the occupier was reasonable.

As submitted, in the face of an ever-changing complex workforce in the workplace, the government seeks to provide an unfettered right for the permit holder to enter the meal room or meal area.

I. THE NEW RIGHT OF ENTRY ABOUT LOCATION

The proposed amendment to s 492 and s 505:

- Seek to provide rights to a group that represents barely over ten per cent of the workforce in private industry;

- Seeks to provide legislative rights in a form that has never existed;

- Seeks to legitimise a right that would, under common law be in violation of, and trespass on, the rights of those holding an interest in the property.

- Provides a right available to no other interest group in private industry;

- Seeks to provide rights to a group to enter meal areas where not only employees congregate but, in many cases as shown by evidence in the cases, management, staff and contractors and self-employed tradespersons;

- Seeks to provide no rights in situations where the workforce do not wish to have permit holders attending the meal or break areas;

- Interferes substantially with the rights of the occupier;

- Can only be described as a backward and retrograde step in terms of fairness to employees (especially) and occupiers/employers;

- Cannot be described as an even-handed or balanced approach to right of entry for the purpose of interviewing or having discussions;

- Seems to imply that all workplaces are similar in every respect i.e. one hat fits all;

- Appears to satisfy the long held paranoia of the trade union movement that seems to believe it has an almost unfettered right to be allowed into meal rooms where employees are consuming their meals;

- Gives no legislative right to the vast number of employees who wish to consume meals and take breaks without interruption;

- Runs counter to recent tribunal and court dicta concerning the legislative balance and industrial workplace law history;

- Clearly excludes the independent umpire (namely the FWC) from the equation in resolving location disputes;

- Seeks to enshrine a right of entry provision into legislation more appropriate with 1913 than 2013.

The fact that permit holders are poor salespersons and have not been able to convince the FWC as to meal room access is no reason to provide them with rights that will exponentially affect employees and occupier and have the potential to disrupt meal rooms, meal rooms with canteens, smoko areas and others. The purpose of legislation in this area should be to limit disputes not create them.

J. WHY IS THE CHANGE NECESSARY?

So what circumstances has changed between 2006/2009 and now to warrant amendments to s 492 and 505? There do not appear to be any 'public interest' considerations and we have already commented upon the Fair Work Act Review Report.

There is not one justifiable reason why the amendments to s 492 or s 505(1)(a) are desirable let alone necessary. FWC has the power to decide the reasonableness of location and to declare the occupier's choice as unreasonable in the circumstances.

Permit holders representing organisations of employees invariably desire to enter lunch rooms or smoko areas where employees are congregated during the meal and other breaks. Employers pick up the cudgel of opinion of the majority of employees at some workplaces. These employees do not wish to have any salespersons be it union officials or others in the meal break area where food is consumed and where the break is limited to between 30 minutes to 60 minutes.

Invariably, this attitude of the employees/occupier leads to proceedings before the Tribunal that has to determine the reasonableness or otherwise of the employer's request about location.

The Act provides a balance for FWC to resolve any dispute.

AMIC or occupiers of premises cannot be held responsible if, on a number of occasions, the independent umpire has denied the permit holder the right to enter the meal room or meal area. On each occasion there appeared to be good and cogent reasons as to why the area chosen by the occupier was reasonable and why the meal rooms were not suitable. The evidence of the permit holder fell short of what was required.

In the AMIC's view the amendments to s492 can only be described as being politically motivated having regard to the failure of the union movement generally to gain automatic rights into the meal areas of workplaces when employees or a majority of those employees seek to consume meals in the meal areas without disturbance.

K. WHAT NEEDS TO BE DONE?

Very simply, the submission of the AMIC is that s 492 of the Act should be retained. A removal denigrates the interests of the employees and occupier. The latter should be able to nominate a reasonable location for a permit holder to hold discussions.

Should the government persist with a view to repealing s 492 and inserting a new 492 as appears in the Bill, then the proposed s 492 should not be excluded from the jurisdiction of FWC to deal with a dispute relating to the location area for discussions and whether it is reasonable that permit holders should be allowed to enter the meal rooms or meal areas during meal breaks of the workforce. Implicit in such a submission is that the legislature should recognise that, if a majority of the employees (be they employees of the occupier or sub-contractor or labour hire entity) do not wish to be disturbed during meal breaks or have permit holders in their presence, that view should be catered for under the legislation.

L. OTHER ASPECTS OF THE BILL

The fact that AMIC has chosen to make submissions only to a specific part of the Bill should not be taken that we support or oppose the remaining parts if observations are forthcoming in that respect.