# VACC Submission to the House of Representatives Inquiry into Inhibitors to Employment for Small Business and Disincentives to Working for Individuals

8 May 2015

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## Terms of References

The Education and Employment Committee will inquire into and report on matters that inhibit or discourage job-creation and employment by private sector small businesses and/or provide disincentives to individuals from working for such businesses, including the following matters:

1. Matters relating to State and Commonwealth laws and regulations including, but not limited to, those that impose excessive red tape and compliance costs in relation to employment;

2. Matters relating to laws or regulations that inhibit small business expansion to create additional employment;

3. Factors that discourage or prevent certain cohorts of Australians from gaining employment in small businesses, in particular young job seekers, mature aged Australians, those from regional areas and those with a partial work capacity; and

4. Other related matters that the Committee considers relevant.

In this submission, VACC has focused particularly on red tape issues associated with the workplace relations framework, as well as issues relating to training that both employers and employees face. These issues have negatively impacted employment levels among our membership base.

## Matters relating to State and Commonwealth laws and regulations including, but not limited to, those that impose excessive red tape and compliance costs in relation to employment

### Administration of paid parental leave

Under Part 3-2, Division 2 of the *Paid Parental Leave Act 2010*, employers are required to administer the payment of Paid Parental Leave ("PPL") instalments to eligible employees. Under Part 3-2, Division 4 of the *Paid Parental Leave Act 2010*, employers are required to comply with associated record keeping and notification obligations. Having small businesses act as the 'paymaster' of PPL serves no real policy purpose and merely creates significant administrative burden that inhibits the productivity of small businesses.

The 2013 ACCI Pre-election survey found that 84.3% of businesses either agreed or strongly agreed that the Government should not require employers to be the 'paymaster' for PPL.[1] To have the employer act as the 'paymaster' is an unnecessary layer on top of an already very complicated workplace relations system. According to the 2015 ACCI National Red Tape Survey, employee wages, conditions and superannuation is the second highest rated category for complexity, after workplace health and safety and workers compensation.[2] Essentially, with regard to employee wages, conditions and superannuation, 57.6% of respondents rated it as being either very complex or extremely complex, up from 51.4% since the last ACCI National Red Tape Survey. These survey results illustrate that the great majority of businesses support removing this requirement to ease their compliance burden.

The *Paid Parental Leave Amendment Bill 2014* is currently before the Senate and addresses the above issues by amending the *Paid Parental Leave Act 2010* to remove the compulsory requirement for employers to provide paid parental leave to eligible employees. As such, it is important that the Senate passes this Bill to ease the compliance burden among small businesses.

**Recommendation: That the Senate passes the *Paid Parental Leave Amendment Bill 2014* as soon as possible**

### Mandatory reporting of gender-related issues

The requirement to conduct mandatory reporting of gender-related issues is administratively burdensome and has had little to no effect on the social and cultural factors that have led to male-domination of the automotive industry.

Additionally, reporting on non-managerial roles is needless as the wages for such roles are based on the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* and enterprise agreements, both of which prescribe wages on a gender-neutral basis. Further, gender reporting requirements in their current state have become a significant compliance and cost

[1] ACCI Pre-Election Survey, May 2013, http://www.acci.asn.au/getattachment/a75b19cc-d9b4-4cf6-9600-b6e7a6553ba6/ACCI-Pre-election-Survey-2013.aspx
[2] ACCI 2015 National Red Tape Survey, http://www.acci.asn.au/getattachment/17fd0073-1f55-49c4-936b-c465ddde02d7/ACCI-2015-National-Red-Tape-Survey.aspx

burden among our members and has detrimentally affected the productivity of our members' businesses.

According to the 2015 ACCI National Red Tape Survey, record keeping was noted as the most expensive compliance activity, with 75.6% rating its cost as either 'very large' (33.2%) or 'somewhat large' (42.4%).[3]

**Recommendation: That mandatory reporting of gender-reporting issues should be removed**

## Unfair dismissals

There are several problems with the unfair dismissal system as it currently stands. These include overly complex procedural fairness requirements, lack of consistency and direction from the Fair Work Commission ("FWC") decisions, lack of relevant factors taken into account by the FWC, a Fair Dismissal Code that provides very little protection to small business and it has not worked in the manner promised, the return of 'go away money', an unnecessarily complicated definition of 'genuine redundancy' and problems with the conciliation process.

Members feel that the balance has swung too far in favour of employees. The procedural fairness requirements in the unfair dismissal process has become so cumbersome that it makes it almost impossible for an employer to carry out a 'fair' termination process that would protect a business from an unfair dismissal claim. As a result, there is a failure in the *Fair Work Act 2009* to provide rights and obligations that are simple and straightforward to understand.

The range of factors the FWC can take into account makes it extremely difficult for an employer to know whether or not they have done the right thing. An individual's personal circumstances may be taken into account, meaning an employer is required to have knowledge of an employee's individual circumstances yet must tread carefully due to privacy, workplace health and safety and discrimination law obligations.

Due to the complexity and time required for a thorough disciplinary process, employees are setting up potential avenues for redress before they are terminated or seeking protection behind monthly medical certificates issued by medical practitioners for stress-related illness to frustrate a disciplinary/termination process.

Members are concerned that the range of prescribed factors that the FWC can take into account does not include matters that are relevant to them. For example, the impact of an employee's behaviour in the workplace is a very relevant factor in determining how to proceed with disciplinary action. VACC frequently has members advising that they have no option but to dismiss an employee because keeping the employee on during the disciplinary process would be too detrimental to morale or health and safety of others in the workplace.

[3] Ibid

The concept of 'a fair go all round' is no longer used. The factors that the FWC may take into account do not include an assessment of the workplace to determine how the attitude, conduct, performance or behaviour of the dismissed employee impacted on other employees and productivity and efficiency. The FWC is not required, as part of the procedural fairness process, to consider whether these factors were relevant to the way an employee was dismissed. There is a need to look at the dismissed employee's performance on workplace efficiency and productivity and the impact on other employees. This should be given equal weighting to the dismissed employee's right to have the opportunity to respond to the issues raised by the employer. Small businesses do not have human resources staff to manage workplace issues 'on the spot'.

Unfortunately, 'go away money' in unfair dismissal claims has returned in exactly the same way as it had operated prior to Work Choices. Employers are now resigned to the fact that it is likely they will receive an unfair dismissal claim if they terminate an employee on performance and conduct grounds.

Members are also aware of the time and cost of legal proceedings should they wish to defend an unfair dismissal claim. The level of commitment and complexity required to prepare a case now has increased significantly since unfair dismissals came under the jurisdiction of the Australian Industrial Relations Commission in the 1990's.

Where an applicant does not comply with directions given by the FWC, members of the FWC go out of their way to contact them and give them every opportunity to comply with directions. Meanwhile, the employer has to attend on all occasions at a substantial cost in terms of time and money. Employers are not granted the same procedural fairness allocated to employees. FWC members allocated to a particular case should dismiss an application if an employee has not complied with directions unless the applicant can demonstrate satisfactory reasons as to why they had not complied.

Case studies that illustrate how employers will pay 'go away money' rather than go through the process of defending their right to terminate an employee can be found in the appendix.

**Recommendations:**

1. **That consideration be given to introducing an all-round fairer and simpler set of principles to allow the FWC and all parties involved in an unfair dismissal application to deal with claims in a more expeditious and balanced way.**
2. **That consideration be given to how payment of 'go away money' can be eliminated or reduced in unfair dismissal claims.**

## Annual leave loading on termination

Section 90(1) of the *Fair Work Act 2009* makes it clear that the payment for annual leave is at the 'base rate of pay.' Section 90(2) of the *Fair Work Act 2009* indicates that upon termination, an employee is paid what he or she would have been paid if he or she had taken the leave while working. It is our view that section 90 prescribes the payment applicable for an employee covered by the National Employment Standards (NES). Modern awards such as the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* ("VMRSR Award"), provide for the payment of an annual leave loading when leave is taken. But clause

29.8 of the VMRSR Award determines that the leave loading is not paid on untaken leave paid out on termination. The VMRSR 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 (see clause 29.7 of the VMRSR Award).

Unfortunately, since 2011 the Fair Work Ombudsman ("FWO") has taken the view that the NES under section 90 requires the payment of the annual leave loading on untaken leave on termination. This is a departure from the accepted position over the history of award coverage in the vehicle industry and other industries since the introduction of the annual leave loading as a general award provision. The FWO has not attempted to prosecute any employers leaving it to individual employees to make any claims in a local court. However, the recent Federal Court case of *Centennial Northern Mining Services Pty Ltd* v *Construction, Forestry, Mining and Energy Union* (No 2) [2015] FCA 136 agreed with the FWO's opinion.

This new Federal Court decision imposes a further substantial cost input on businesses, particularly small businesses. The decision, if not corrected by legislation, makes a mockery of the award modernisation principles which led to the introduction of modern awards on 1 January 2010. The original award modernisation request in June 2008 specified that it was not the intention of the award modernisation process to increase costs to employers.

The introduction of the NES on the same date as modern awards commenced operating directly contradicts the intention of the award modernisation request in section 90(2) of the *Fair Work Act 2009,* by adding an additional obligation to pay for annual leave loading when an employee is not physically taking annual leave.

The 2012 Expert Panel Review of the *Fair Work Act 2009* recommended amending section 90 to provide that annual leave loading is not payable on termination unless otherwise stated in a modern award or enterprise agreement. However, the previous Government did not accept the Expert Panel's recommendation. This is an unsatisfactory position and the matter should be cleared up with an appropriate notation in the legislation.

**Recommendation: That a formal note be included at the end of section 90 of the Fair Work Act 2009 as follows:**

**"Note: Section 90 does not prescribe conditions in relation to the payment or non-payment of the annual leave loading applicable under a modern award, enterprise agreement or a WR Act instrument."**

## Notice of termination

Section 117(1) of the *Fair Work Act 2009* should be amended to ensure that the notice period must be worked out by the employee except where section 117(2) applies to the termination. These sections require an employer to provide an employee with written notice of the termination and a minimum period of notice or pay in lieu of notice.

In relation to the notice requirements upon employees, most modern awards refer to the NES and apply reciprocal obligations on employees. VACC are finding that many employees are providing notice during a period of annual leave or personal leave and not returning to

work, or providing notice just before arranged annual leave or taking personal leave and including this period of leave to meet the notice requirement. Section 117 of the *Fair Work Act 2009* should make it clear that an employee must work out their notice period and equally the employer must provide work for the employee for the period of notice, unless otherwise agreed.

**Recommendation: That at the end of section 117(1) of the *Fair Work Act 2009*, the following be inserted:**

**"Unless otherwise agreed between the parties, or by shorter notice accepted by the employer, once notice of termination is provided such notice must be worked out by the employee and exclude any period of annual leave or personal leave. Where such notice is given during a period of absence on annual leave or personal leave, the required period of notice under subsection (3) will commence from the end of the period of annual leave or personal leave."**

## Frustration of the employment contract

The requirement to provide notice or pay in lieu of notice under section 117 of the *Fair Work Act 2009* does not exclude circumstances where, through no fault of the employer, an employee's contract of employment comes to an end. Often this is due to incarceration or a conviction for driving under the influence of alcohol, leading to the loss of various driver related licences. In most cases for such employees, especially in the vehicle industry, they can no longer fulfil the inherent requirements of the employee's contract of employment and at common law the contract has come to an end as a result of frustration of contract. Unfortunately, there is no clear exclusion of the requirement on the employer to provide notice or pay in lieu of notice.

**Recommendation: That section 123(1)(e) of the *Fair Work Act 2009* be renumbered as (f) and a new subsection (e) be included as follows:**

**"(e) an employee whose employment is terminated because of incarceration, loss of required motor vehicle or machinery licence where such licence is an inherent condition of employment, or where the contract of employment comes to an end by the inability of the employee to fulfil the employee's contract of employment."**

## Paid no safe job leave

'Paid no safe job leave' under section 81A of the *Fair Work Act 2009* should be removed. This issue clearly discriminates against small business. Notwithstanding the impact on small business, such a requirement on any business is unfair. In the rare situation where a pregnant employee cannot work and the employer cannot find alternative safe work, section 81A(2) requires the employer to continue to pay the 'base rate of pay' wages to the employee for the period the employee cannot work in the role for which they were employed.

Section 81A prescribes an additional wage cost to an employer where no actual work is being performed. In cases where the employer has to engage someone else to do the employee's job, it causes an effective doubling up of wages. This type of payment is enough to eliminate the profit made by a small business in any week that this payment must be made. As there is potential for this type of absence to occur for many weeks on end, the payments can add up to a very large sum of money.

*Case study*
One member had an employee who was an apprentice spray painter. She became pregnant and informed her employer. Due to the risks inherent in working with the chemicals in spray painting (e.g. isocyanates), the employer was forced to pay 'no safe job pay' for the remainder of her pregnancy. The duration of the 'no safe job pay' was about 32 weeks. This is an unfair imposition on a small business.

**Recommendations:**

1. **That sections 81A and 82 of the Fair Work Act be deleted. Further consequential amendments need to be made to section 81 to give effect to this recommendation.**
2. **If there is not a total deletion of these clauses, there should be a limitation of their operation on small businesses with less than 15 employees.**

## Temporary absence due to illness or injury

Under section 772 of the *Fair Work Act 2009*, an employee must not terminate an employee's employment because the employee is temporarily absent from work because of illness or injury of a kind prescribed in the regulations.

Regulation 6.04(4) of the Fair Work Regulations, for the purposes of section 772 of the *Fair Work Act 2009*, states that "an illness or injury is not a prescribed kind of illness or injury if:

(a) either:
  (i) the employer's absence extends for more than 3 months; or
  (ii) the total absences of the employee within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illness or injuries); and
(b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the *Fair Work Act 2009* for the duration of the absence."

This time period has caused a great deal of frustration for small businesses operating in the automotive industry. The staffing of a small business is structured around staff in specialised roles. If staff are on long term illness or injury, a small business does not generally have the capacity to move other staff into the position or recruit casual or part time staff to fill the role due to skills shortages in the industry. In the interim period pending the return of an employee from illness or injury, this provision has a real adverse impact on the operation of the business. Whilst VACC clearly recognises an employer's obligation to keep a role open for an employee who is using accrued personal leave, the period of absence on unpaid leave should be reduced for a small business.

**Recommendation: The period of absence on unpaid personal leave due to illness or injury should be reduced to no more than a month in the case of a small business.**

## General protections

Our members are very concerned about the general protections provisions. VACC are seeing more claims in this area as awareness is raised. These provisions are so broad and subjective they create great uncertainty for employers. These provisions encourage vague, vexatious and ill-advised claims.

Employers are also burdened with a reverse onus of proof in defending adverse action claims. This makes them extremely difficult to defend, particularly for small businesses that are less likely to maintain sufficient records.

It has been the experience of our organisations, with the exception of MTA South Australia, that some Fair Work Commission ("FWC") conciliators use the reverse onus of proof requirement to persuade employers to settle matters by paying 'go away money' in conciliation conferences.

The adverse action claim should be removed from the *Fair Work Act 2009* and if necessary, the previous unlawful termination provisions returned. The onus of proof should be changed to the applicant in unlawful termination cases.

Further, the general protections provisions are an unnecessary layer of regulation and provide yet another avenue for an employee to make a complaint, should another claim be unsuccessful. Employers are entitled to a level of certainty when a claim is dismissed.

Finally, it is unnecessary to have separate discrimination provisions in the general protections provisions. There is more than adequate protection against discrimination in employment in State and Federal anti-discrimination legislation. It is not necessary to provide this opportunity for forum shopping.

Case studies concerning members' experiences with the general protection provisions can be found in the appendix.

**Recommendations: That the general protections provisions be removed and replaced if necessary, with the former unlawful termination provisions. Further, that the ability to make discrimination claims be removed from the *Fair Work Act 2009*.**

## Duplication of workplace discrimination legislation

Employers in the Victorian and Tasmanian Motor Vehicle Industry are subject to both Federal and State discrimination prevention laws. In addition, VACC members need to comply with anti-discrimination provisions of non-discrimination statutes and subordinate legislation at the Federal level, including the *Fair Work Act 2009.* The current differences between the Federal and State discrimination legislation impose a myriad of regulatory obligations that can be challenging and confusing for small and medium size businesses. It is

well known that the existence of multiple regulatory jurisdictions and the inconsistencies in State and Federal legislation encourage forum shopping and create uncertainties.

**Recommendations: That anti-discrimination legislation should be streamlined into one single comprehensive law**

## Encashment of annual leave

VACC and the Motor Trades Associations argued unsuccessfully for an award clause in the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* ("VMRSR Award") allowing for encashment of annual leave during award modernisation. The problem with the lack of a provision in the VMRSR Award for encashment is that the NES only allows encashment where an award expressly provides for it or by an Enterprise Agreement for award covered employees.

*Case study*
In South Australia, an award regulated employee required encashment of annual leave for severe/financial reasons and the employer informed him that this cannot be done because he was not award free. Some employers are pressured into granting encashment of leave entitlements on the same terms as set out in sections 93 and 94 of the *Fair Work Act 2009*, which provide for cashing out of annual leave for award free employees. Such pressure includes threats of resignation where key employees can readily transfer to other skilled shortage industry employers.

Non-award covered employees are able to arrange for encashment through a formal letter to their employer requesting encashment. There are safeguards such as the requirement to hold an amount of 20 days accrued leave.

The requirement for a small business to go through a formal enterprise agreement process to provide for encashment, which is almost always requested by the employee, is totally unrealistic and inequitable given non-award employees may simply request encashment in writing. Encashment of annual leave at the request of *any* employee should be provided for in the *Fair Work Act 2009*, with the abovementioned safeguards. It should not be necessary to rely on an award provision or a provision in an enterprise agreement.

**Recommendation: That sections 92 and 93 of the Fair Work Act 2009 be deleted and section 94(1)-(4) of the *Fair Work Act 2009* be amended to apply to all employees, not just award free employees.**

## Individual flexibility agreements

Currently an employer cannot enter into an Individual Flexibility Agreement (IFA) prior to an employee being employed by the business or as a condition of employment. This is despite an employer being required to ensure that an employee is better off overall than if there was no IFA.

As an example in the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* ("VMRSR Award"), vehicle salespersons are not subject to the provisions relating to 38 ordinary hours of work or overtime payments. There are special provisions for vehicle salespersons that provide that they work either a 5½ day week or 11 day fortnight for which they receive a retainer. The award provides the employer and the vehicle salesperson the opportunity to agree on a sales commission structure. The retainer/ commission structure gives the salesperson the best opportunity to maximise their earning potential, which often falls within the salary range of $70,000 to $100,000 or more.

*Case study*
One Victorian dealership has changed the hours of work arrangements in the VMRSR Award by introducing IFAs which have resulted in salespersons receiving an extra 21 days off each year. However, the inflexibility of the IFA provisions in the *Fair Work Act 2009* mean that a vehicle salesperson cannot be signed up under the same IFA until after they have started with the business.

The practical effect of this restriction means that although the business has put a special roster in place based on the revised hours of work arrangements in the IFAs, a new salesperson may disrupt that roster. A salesperson must commence their employment under the award not the IFA. If the employee does not sign an identical IFA once they commence their employment, this inflexibility has the potential to compromise the new working arrangements and make the roster ineffective and unworkable. This would be to the detriment of all salespersons in the workplace.

Further, either party can terminate an IFA with 28 days' notice under section 203(6). This means that a single employee can disrupt the flexibility introduced by giving notice to end their involvement. This has led to many businesses not bothering to use IFAs. Why go to the trouble of negotiating the terms of an IFA when they can be so easily overturned?

A better system would be if IFAs could be terminated only by agreement between the employer and employee, or failing agreement, by an application to the FWC. The FWC decision would have to take into account the impact on the employer's business of terminating an IFA.

**Recommendation: That IFAs can be made prior to the commencement of employment, and that IFAs can only be terminated by agreement or by an application to the FWC.**

## Enterprise bargaining

The objectives of the *Fair Work Act 2009* set out in section 3 include "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".

There are also objectives set out in section 171 of the *Fair Work Act 2009* which apply specifically to Part 2-4 Enterprise Agreements. One objective is "to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits". The other

objective is for the FWC to facilitate good faith bargaining and the making of enterprise agreements.

One would expect the "simple, flexible and fair framework" to rely on section 228 of the *Fair Work Act 2009* that sets out the good faith bargaining requirements. Both parties and their representatives are required to go through a process of organising and attending meetings, producing documentation and responding to each other's claims in a timely manner.

If, after the process has been concluded, the parties have failed to reach an agreement, a party or parties representing the employees can, through a secret ballot, opt to take protected industrial action.

Unfortunately, Unions have exploited the enterprise bargaining provisions in the *Fair Work Act 2009*, bypassing the objectives of good faith bargaining and delivery of productivity benefits.

Enterprise bargaining as it was under Work Choices was criticised as failing to provide an equitable and balanced system of negotiation and effective registration of enterprise agreements. The system that operated prior to Work Choices was a fairer system. The parties had the opportunity to either negotiate agreements with a union and employees or between the company and its employees directly.

In addition, the Better Off Overall Test (BOOT) has also prevented employers from achieving workplace flexibility and productivity. The new BOOT has effectively taken productivity out of the equation in negotiating an enterprise agreement. This is contrary to the objectives at the beginning of the *Fair Work Act 2009* and in section 171.

There is no scope for an employer to negotiate flexible pay arrangements and working arrangements that suit the nature of the business. The 'no disadvantage test' that operated prior to 27 March 2006 provided employees with some scope for flexibility and productivity, but within defined parameters.

If there is a conflict as to whether employees want to negotiate an enterprise agreement, the matter should be determined as the first step by a majority support determination by the employees conducted by a secret ballot unless the workplace has an equally equitable system of voting on whether negotiation for an enterprise agreement should commence.

It should be a requirement that if a union has not engaged in good faith bargaining based on the steps set out in the *Fair Work Act 2009* or has not discussed productivity gains in a positive way during the good faith bargaining process, then the union should be precluded from taking protected action under the Act.

To ensure there is an orderly process for the negotiation of enterprise agreements, in terms of certainty over the representation of parties, union officials cannot be bargaining agent for employees outside their union coverage.

Many members would like to put in place Enterprise Agreements to meet basic issues arising in the workplace (e.g. cashing out of annual leave) but feel constrained due to the public

approval process, the complexity of the enterprise bargaining process the time involved and potential involvement of unions in such a process or at the time of agreement renewal.

Provided agreements are approved based on the legislative requirements there is no good reason for such agreements to be displayed on a public website. Such agreements could be maintained by the Registry and the privacy of the company and its employees protected.

Another problem with the current enterprise bargaining process is the procedural arrangements required to cancel an enterprise agreement once it has been approved by the FWC. This was recently highlighted in the FWC decision *Metropolitan Fire and Emergency Board* v *United Firefighters Union of Australia* [2014] FWC 7776 where, after 17 hearing days involving legal representation on both sides and 400 exhibits, an application for cancellation of an agreement was rejected. There is also a likelihood the decision will be appealed.

Enterprise agreements have over time become counterproductive for small and medium size businesses. Instead of being used by businesses to improve productivity and recognise employee contributions towards improved productivity, agreements have merely become an add-on to existing awards, which underpin most enterprise agreements. They provide no tangible benefits to the particular operating needs of a business. Once an agreement has been approved by the FWC, a business finds itself seemingly 'locked in perpetuity' to maintaining an agreement due to the stringent requirements attached to cancelling an agreement. A simpler method is needed to cover a situation where a business, faced with adverse economic or changed business operating arrangements, can make the necessary business changes due to changed circumstances.

**Recommendations:**

1. **That protected industrial action should be precluded if a union has not obtained a majority support determination, conducted good faith bargaining and discussed productivity gains with the employer.**
2. **Productivity offsets must be included in the good faith bargaining process. If not, then a union should be precluded from taking protected action under the Act.**
3. **Union officials should not be able to act as a bargaining agent for employees outside their union's coverage.**
4. **Consideration be given to a return to the previous system where an employer could negotiate with a union or directly with employees.**
5. **Review the process and procedures, including the time prescribed, to approve an Enterprise Agreement as they are presently too complex for small to medium size businesses to consider using such agreements. This review should also aim to reduce the workload of FWC members and allow for private agreements between employers and employees.**
6. **Finally, consideration should also be given to returning to a 'no disadvantage test' rather than the BOOT, which is too restrictive and prevents employers from achieving flexible arrangements appropriate to their workplace.**
7. **A simpler cancellation process that takes account of changed economic or business operating circumstances.**

## Meaning of 'genuine redundancy'

VACC proposes the simplification of the definition of genuine redundancies. Our experience is that matters that are clearly genuine redundancies are becoming the subject of full arbitration proceedings due to technical breaches of s389 where shortcomings in the consultation process are tested. In *Jamil Maswan* v *Escada Textilvertrieb t/a ESCADA* [2011] FWA 4239, there was a breach of the consultation requirements on a redundancy matter. VP Watson rightly, in our view, dismissed the matter on the basis that, despite the technical breach, the redundancy would still have occurred regardless of the lack of consultation (paragraphs 41 and 42 of the decision).

Unfortunately, VP Watson's position has not been consistently applied by the FWC. In *UES (Int'l) Pty Ltd* v *Leevan Harvey* [2012] FWAFB 5241, the Full Bench of the FWC ordered the employer to pay its former employee two weeks' wages despite finding that the redundancy would have occurred even with the requisite consultation period. Many businesses undergoing necessary redundancies are struggling to survive and this process requirement places an additional burden on them entirely unrelated to whether the redundancies are appropriate to the business' circumstances. Furthermore, this position unfairly discriminates against small businesses who cannot afford the human resources staff to satisfy consultation requirements.

In a number of cases in the automotive industry, small businesses are told by their financial advisor that they have to close their business down immediately or with a short period of notice which does not allow adequate time for consultation based on existing award consultation procedures.

VACC proposes that section 389(1)(b) of the *Fair Work Act 2009* should be deleted. This will allow for the removal of such technical breaches and ensure appropriate jurisdictional challenges may be made to minimise the cost of full arbitrations of such matters.

**Recommendation: That section 389(1)(b) of the *Fair Work Act 2009* be deleted.**

## Matters relating to laws or regulations that inhibit small business expansion to create additional employment

### Transfer of business

Part 2-8 of the *Fair Work Act 2009* allows for the transfer of certain instruments and protection of high-income employees. The transfer of certain instruments leads to restrictions of the ability of employers to purchase a business unencumbered.

Having to pay employees based on a range of different agreements is overly restrictive and a trap for some employers that are not aware of this requirement. The costs of such agreements often make a sale unviable. This restriction on the normal sale of a business is inappropriate and unnecessary. The requirement to seek orders from the FWC that such instruments will not transfer is impracticable for some businesses due to the exposure of the business to union intervention. Our experience is that orders are issued where an application is made so it seems unnecessary to require the application. In the circumstances this protection is not appropriate and should be removed.

These provisions are inconsistent with the objectives of the *Fair Work Act 2009* and fail to meet the objectives of Part 2-8, which are set out in section 309. These objectives are to provide a balance between the protection of employees' terms and conditions of employment and the interests of employers in running their enterprises efficiently.

As they currently stand, this Part does not allow employers to run their businesses efficiently. The acquisition of a business can become very complicated with a number of awards and enterprise agreements applying to different parts of the business. It also makes it very difficult for a business that wishes to buy another business to add to an already existing business. In these circumstances, there can be two or more different enterprise agreements applying to employees who do the same type of work.

It would be preferable to start with a clean slate, with terms and conditions to be derived from the NES, modern awards, and in time, a new enterprise agreement, should they wish to negotiate one.

In relation to high-income earners, this protection is not needed and only leads to such employees not being offered employment in the new business. If the employee is of crucial importance to a business, they can negotiate appropriate outcomes for themselves in any event.

**Recommendation: That Part 2-8 of the *Fair Work Act 2009* be deleted.**
**Alternatively, that the transfer of business provisions be simplified so that employers can understand their obligations.**

## Factors that discourage or prevent certain cohorts of Australians from gaining employment in small businesses, in particular young job seekers, mature aged Australians, those from regional areas and those with a partial work capacity

### Cost of employing apprentices

Employing apprentices is a significant cost for employers and is a factor that has prevented young job seekers from being able to gain employment in small automotive businesses. According to Bednarz, it is generally agreed that an apprentice is a direct cost to the employer for the first two years and that much of the cost is due to the amount of supervision that the employer is required to provide to the apprentice.[4] From an employer's perspective, hiring an apprentice is an investment. In general, employers will not hire apprentices if the cost of hiring an apprentice outweighs the perceived return of investment. Indeed, recent changes to apprentice wages and conditions have contributed to the decrease in apprentice hiring intentions.

On 22 August 2013, the Full Bench of the Fair Work Commission ("FWC") handed down a decision on apprentice wages and conditions. This decision has had significant cost implications for automotive businesses. In essence, the decision increased the wage rates of junior apprentices employed after 1 January 2014. In December 2013, a first year junior apprentice under the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* ("VMRSR Award") with a completed VCE or senior VCAL certificate was entitled to a gross rate of pay of $304.29 per week. That same junior apprentice, commencing his or her apprenticeship today under the same award, would now be entitled to $410.41 gross per week – an increase of almost 35%.

Furthermore, with regard to adult apprentice wages (apprentices aged 21 years and over), for a 1st year adult apprentice before the FWC decision, the weekly rate of pay was $565.60. Since the FWC decision, the weekly rate of pay for adult apprentices commencing on or after 1 January 2014 is $597.00. There is a trend for automotive business, exemplified within VACC's membership, to not hire adult apprentices due to their high rates of pay, therefore creating a barrier for young apprentices aged 21 to 24 from entering into the workforce. Such a significant increase in the adult apprenticeship weekly rate has meant that automotive employers are more reluctant to hire 21 to 24 year old apprentices. The change to adult apprentice wages and conditions was nonsensical given the consistently high unemployment rate of this age bracket. As it stands, the unemployment rate for 20-24 year olds, despite having a participation rate of 79.6%, is currently 11.4% as of February 2015, the second highest unemployment rate out of all the ABS age brackets (behind 15-19 year olds).[5]

The increases were applied to the first and second year levels over a phasing in period, which concluded on 1 January 2015. The accumulated result of the Full Bench's decision to stagger new wages and conditions for apprentices has meant apprentice pay rates have increased four times since 30 June 2013. From an employer's perspective, this has created organisational fatigue and has left payroll systems struggling to keep up to date.

[4] Bednarz, A. 2014, 'Understanding the non-completion of apprentices', NCVER, p. 30.
[5] ABS Labour Force, cat. no. 6291.0.55.001

With regard to new conditions in the VMRSR Award, the FWC decision has stipulated that employers are required to pay all costs associated with all fees for prescribed courses and textbooks. In addition, employers are also required to pay for travelling costs if the apprentice travels in excess to their Registered Training Organisation (RTO). Travel costs includes costs associated with transportation, accommodation, and other expenses such as meals. Indeed, the FWC has merely transferred the financial onus associated with training and traveling from the apprentice to that of the employer. This was done without considering the detrimental effects it had to the small business community that make up the majority of the automotive industry.

There is evidence showing that the costs associated with the employing of apprentices has resulted in automotive businesses becoming reluctant in hiring more apprentices. Results from the 2015 Automotive Environmental Scan (E-Scan) Survey[6] depicts that the majority of business respondents (57%) did not employ any apprentices, which was a slight increase on last year (53%).[7] Furthermore, only 25% of all respondents reported any intention of hiring apprentices over the next 12 months, with the majority of these (60%) indicating they intended to hire only one apprentice.[8]

Further evidence from NCVER illustrates that there has been a decline in apprenticeship and traineeship commencements in the automotive trade professions since 2012. According to NCVER apprentice and trainee data, with regard to the automotive trades, there has been a consistent decline in apprenticeship and traineeship commencements for each March quarter[9] since 2012:[10]

- March 2012 – 10,200
- March 2013 – 8,900
- March 2014 – 7,200

There has also been a decline in commencements for each quarter for automotive and engineering since 2012:[11]

[6] A sample of 500 automotive businesses was selected within the survey. Given the national population of automotive businesses is approximately 64,772 (ABS: Counts of Australian Businesses Cat. No. 8165.0), a sample size of 500 businesses allowed for a 95% confidence level with the data, or a 4.4% margin of error. Therefore if 50% of business respondents sampled claim to be affected by shortages of skilled labour, one can be 95% confident that the true value for the whole population falls between 50 ± 4.4, that is, in a range from 45.6% to 54.4%.

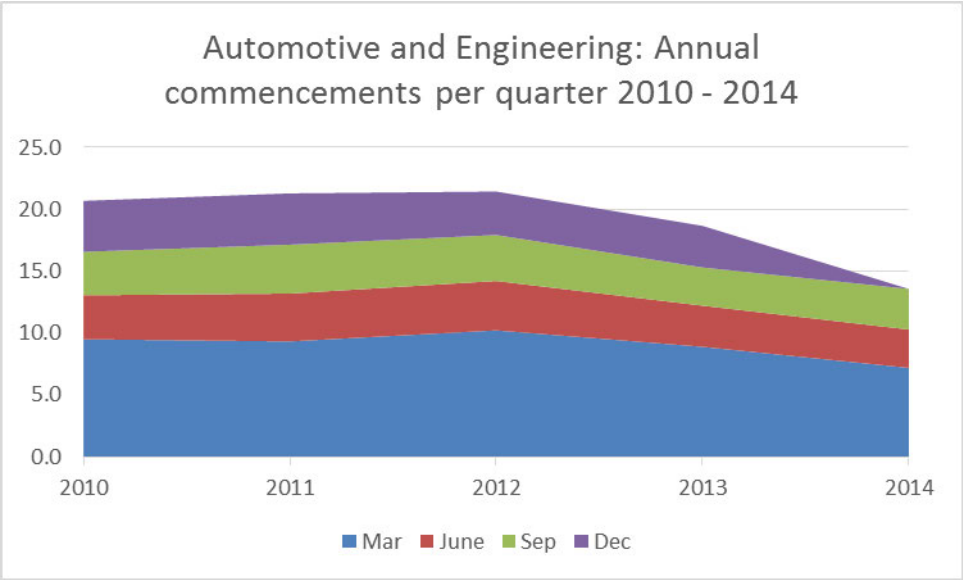
[7] 2015 Automotive Environmental Scan, http://www.autoskillsaustralia.com.au/wp-content/uploads/2015_Automotive-Escan.pdf, p. 15.

[8] Ibid, p. 15.

[9] The March quarter is used as that is when the greatest concentration of apprenticeship and traineeship commencements occur.

[10] NCVER, Apprentice and Trainee Collection, September quarter.

[11] Data for December quarter 2014 has not yet been released.

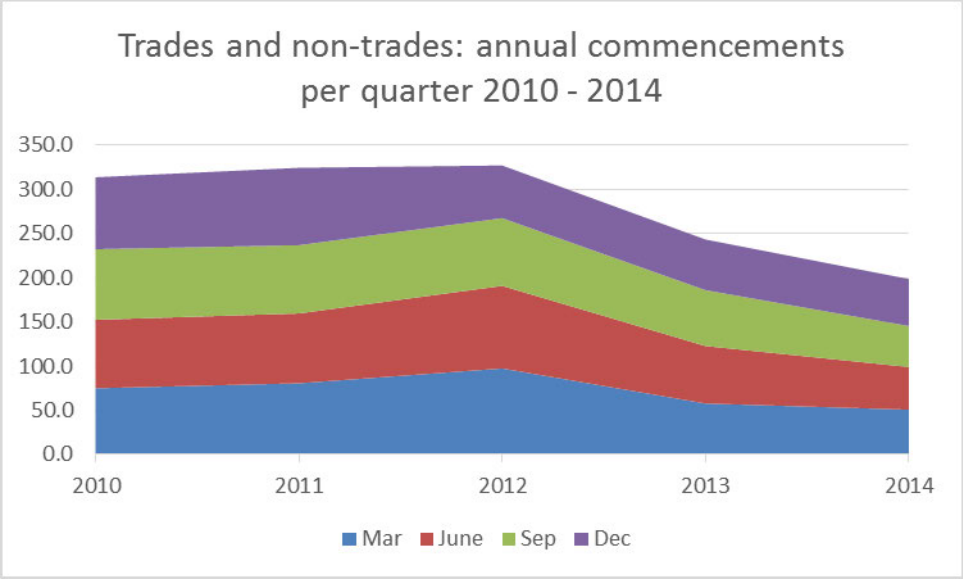



Source: NCVER, Apprentice and Trainee Collection, September quarter

This decline in March commencements is not only seen within the automotive trades, but is also evident for all occupational (ANZSCO) groups:[12]

- March 2012 – 102,600
- March 2013 – 69,700
- March 2014 – 61,600

There has also been a decline in commencements for each quarter for all trades and non-trades since 2012.[13] This suggest that the issue is pervasive in other industries as well.




Source: NCVER, Apprentice and Trainee Collection, September quarter

NCVER has released the Apprenticeships Early Trend Estimates for the December 2014 quarter which found an increase in apprenticeship commencements for that quarter. However, these results are probably an outlier and any suggestion that they mark an end to

[12] NCVER, Apprentice and Trainee Collection, September quarter 2014
[13] Ibid

the decline remains premature until other data on apprenticeship commencements for future quarters are released.

The current slow economic conditions, together with the issues automotive businesses are currently facing such as business consolidation and trying to keep up with changes in vehicle technology, are already significant factors that have negatively affected apprenticeship numbers. More than 95% of the automotive industry is comprised of small businesses (non-employing businesses and businesses with 1-19 employees).[14] As such, increasing the cost of hiring an apprentice will mean that in the future, only a small concentration of large automotive businesses will be able to hire apprentices, at the expense of small automotive businesses that make up the industry majority.

**Recommendations:**

1. **That issues such as hiring practices, skill shortages, apprenticeship and traineeship commencements and business confidence be taken into consideration when any changes are made to the workplace relations system and any wage increase awarded in annual wage reviews.**
2. **That employers be adequately incentivised to employ, rather than unnecessarily hampered through over regulation and regressive State payroll systems.**

## Cessation of mentoring services for apprentices

On 1 January 2015, the Government abolished a number of skills and training programs which included the Australian Apprenticeships Mentoring Programme despite proven success in apprenticeship retention rates as a result of the program. The Government must continue to provide incentives to encourage employers to engage with and invest in apprenticeships. The Mentor/Advisor Apprenticeship Program (MAAP) was designed by the automotive industry for the automotive industry and its success has led to significantly improved retention rates for first year Victorian apprentices. Encouraging employers to engage and invest in apprenticeships has become ever more vital in the current climate where apprenticeship commencements and apprenticeship hiring intentions are falling. The abolition of mentoring programs like MAAP will lead to declining retention rates which had improved as a result of the program. In addition, mentoring is vital to address the growing number of apprentices disengaging and falling victim to self-harm or suicidal tendencies.

Positive feedback from automotive employers that have used MAAP can be found in the appendix.

**Recommendations:**

1. **That the Government should reinstate the successful Australian Apprenticeships Mentoring Programmes managed by industry.**

[14] 2015 Automotive Environmental Scan, http://www.autoskillsaustralia.com.au/wp-content/uploads/2015_Automotive-Escan.pdf, p. 10.

## Structured Workplace Learning

Structured workplace learning (SWL) is on-the-job training that is primarily observational and is structured in a way that allows the student exposure and practical insight into industry. In addition, there is no requirement for students on the placement to be "productive" for the host employer/business.

Yet, despite structured workplace learning being observational-based work experience, it has been over-relied on and at times, misused by both schools and employers. Below are problems identified within SWL:

- SWL being used as a substitute for school-based apprenticeships and traineeships (SBAT).
- The over extension of SWL duration
- The lack of accountability of how SWL is being conducted within a business.

The aforementioned problems has had a negative impact on industry-based outcomes as poorly constructed SWL has led to students developing no real industry relevant skills, resulting in them being lost to the industry.

Refer to appendix for a list of case studies of poorly constructed SWL.

**Recommendation:**

1. **SWL should only be utilised in a limited timeframe of no more than 10 working days at a workplace.**
2. **SWL should remain a taster program that provides an introduction to industry.**

## Sub-standard training delivered by TAFEs and private registered training providers

The marketisation of the training market has resulted in a race to the bottom in terms of the provision of quality training among both TAFEs and private registered training providers (RTOs). In essence, it has led to a rise in for-profit-oriented private RTOs that would reduce their quality of training and selectively choose courses that are inexpensive to deliver in order to accumulate the most profit. Consequently, this had the effect of financially disadvantaging TAFEs, resulting in TAFEs to cut costs at the expense of providing quality training.

Currently, all training programs are funded equally, irrespective of how the course is being delivered. Consideration is not given towards the use of teaching resources, the length of the course or whether it meets industry needs. In addition, the new *Standards for Registered Training Organisations 2015* has introduced the notion of an 'earned autonomy model of regulation.' This means that some RTOs would have the ability to change their own registration without requiring regulation. In effect, this has led to some private RTOs delivering courses beyond their scope of expertise, resulting in a decline in the quality of training offered.

Furthermore, the competitive training market also saw an upsurge of private RTOs using unscrupulous marketing techniques in an effort to increase student enrolment. VACC has

witnessed aggressive marketing techniques that have included cold calling and face-to-face interaction. There have also been cases of private RTOs falsely stating to VACC members that a particular qualification must be undertaken for their trade due to legislative change. Further, the use of incentives such as free iPads, laptops, and financial incentives have been used to entice VACC members to enrol in a course.

The current competitive training market has resulted in many to enrol in courses that do not meet the needs of industry, consequently preventing many from finding employment within the small business sector.

Anecdotal evidence from VACC members on their experience with the TAFEs, as well as evidence of unscrupulous behaviour from private RTOs can be found in the appendix.

## Other related matters that the Committee considers relevant

### Four year review of modern awards

Due to the seemingly never ending review of awards which started in April 2008, the timing of future reviews must take into account the need for businesses to have adequate time to come to terms with the new awards and any revised conditions. Businesses, which have not had the chance to draw breath after coming to terms with the FWC Full Bench decision [2013] FWCFB 5411 on 23 August 2013 that awarded substantial wage increases and changes in conditions of employment for junior and adult apprentices, are now faced with potentially significant award changes as a result of another review.

Since the modern awards were introduced on 1 January 2010, the mid-term review which started in March 2012 ran into the four year review. Given the breadth of issues before numerous Full Benches in the current four year review, there will be little space between the completion of this four year review and the next one.

As the *Fair Work Act 2009* under sections 157 to 160 have general provisions allowing parties to apply for a variation to modern awards, subject to prescribed requirements set out in these sections, the provisions relating to regular 4 year reviews of modern awards set out in Division 4 of the *Fair Work Act 2009*, should be deleted.

**Recommendation: Division 4 – 4 yearly reviews of modern awards should be deleted from the *Fair Work Act 2009*.**

## About VACC

The Victorian Automobile Chamber of Commerce (VACC) is the peak body for the repair, service and retail sector of the automotive industry in Victoria (and Tasmania). VACC represents over 5,000 members, primarily small businesses, which employ over 50,000 people and have an annual turnover of around $50 billion.

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialist, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and recycling. In addition to VACC, our sister organisations – the Motor Trade Associations, also represent the automotive industry for their respective state.

The automotive industry relies heavily on effective trade training through Certificate III apprenticeship qualifications, Certificate II traineeship qualifications, pre-apprenticeships, and school-based training programs. Auto Skills Australia (ASA) is the body responsible for the development and maintenance of two training packages for the automotive industry: Automotive Manufacturing (AUM) and Automotive Retail, Service and Repair (AUR). There are 64 qualifications embedded within the latest versions of these packages and there are 234 registered training organisations (RTOs) delivering automotive qualifications.

The automotive industry is largely made up of small businesses. Small businesses, including sole traders and businesses with between one and 19 employees, comprise approximately 95% of all automotive businesses. About 13.5% of businesses have an annual turnover of less than $50,000. Medium to large businesses make up the remaining 5% of the automotive industry.

# Appendix

## Case studies of employers paying 'go away money' during an unfair dismissal process

*Case Study 1*
An apprentice was dismissed after the owner of a business found his apprentice at the workplace on Good Friday with three of his friends. The apprentice and his friends were working on their cars and drinking alcohol. Two other employees were also on the premises however they were authorised to be there.

When the apprentice was asked to remove the vehicles, the apprentice swore at the owner and then on removing the last vehicle, he spun the wheels throwing up stones over the employer and his companions who were present. The apprentice also drove a vehicle off the property although he did not have a Victorian licence and spun the wheels again 100 metres from the business premises. The employee was dismissed.

The apprentice made an unfair dismissal claim and his defence was that other people were on the premises too. The matter was settled for four weeks' pay. The owner decided it would be too expensive and time consuming to go through a hearing.

*Case Study 2*
In Victoria, a business cannot employ a person in a vehicle customer sales capacity under the Motor Car Traders Act 1986 if an employee has been convicted of a serious criminal offence. In order to comply with the Motor Car Traders Act, an employer must file a police record check within six weeks of the employee commencing employment. The employer cannot file the request without the consent of the employee.

The employer asked the employee to sign the required form on several occasions but the employee stalled. Due to the length of time taken to lodge the form and receive the police record, the employee had passed the six month minimum period of employment. The police record showed that the employee had been convicted of a serious offence as defined under the *Fair Work Act 2009* (unlawful assault).

The employer terminated the employee because he could not continue to employ him due to his criminal conviction based on the Motor Car Traders Act. The employee filed an unfair dismissal claim as he claimed he was terminated outside the six month qualifying period and the nature of the offence in the police record was not sufficient to warrant termination under the Motor Car Traders Act.

The claim was settled for two weeks' pay. The employer was not prepared to contest the claim due to the cost and time involved in running a case to hearing.

## Case studies concerning general protections

*Case study* (continued next page)
One claim related to section 341(1)(c) of the *Fair Work Act 2009* preventing the exercise of a workplace right in terms of making a complaint. In this claim the claimant was not legally

represented and did not understand the legalities of the adverse action claim. This made it difficult to draft a response.

In this case, an employee was terminated during her probationary period but claimed the owner and his girlfriend did not like her and dismissed her after she allegedly complained to the Chief Financial Officer. The employer paid her a sum of 'go away money' to end the ordeal for the business.

*Case study*
In another case, an employee argued that the termination of her employment was due to the fact that no one liked her. She also said that people had been stealing from the employer. The employer had checked the video surveillance and found no evidence of the claim. The employer explained that the employee frequently used obscene language towards the other staff members and had called two of the other female employees particularly insulting names.

The case was discontinued at conciliation as the conciliator made it clear that the chances of success were extremely limited, however the employer still had to spend a significant amount of time and resources preparing documentation for the conciliation. Cases like these make employers feel that the 'system' has gone too far in protecting the interests of one party in a contractual employment situation.

*Case study*
In this case a difficult employee was dismissed because of poor work performance within the six month minimum period of employment. Because the employee was there for a limited time, no written warnings were provided. The employee was a member of a union. After she was dismissed she claimed she had a workers' compensation injury. This was investigated and the insurer declined the claim.

The union then approached the employer seeking to negotiate a settlement with the employer in respect to the termination in the form of a redundancy payout. The employer advised that they were prepared to make a four week payment to resolve the matter. The union rejected the offer and the employee decided to pursue an adverse action claim on the basis that the employee was dismissed for being a union member.

The matter was finally settled for four weeks' pay, which the employer paid to make the issue 'go away'.

*Case Study* (continued next page)
An employee claimed to be a qualified tradesperson with extensive experience. He talked of his knowledge and prior learning in an eloquent way but once employed used others to cover his skills inadequacies. He was engaged by the business at great cost and given support and training during and beyond the qualifying period.

When his attitude changed the employer tried to work with him, but shifting him to more accountable work led to $46,000 of rework in six months, major safety breaches and some evidence of underlying bullying of people from other cultures and female employees. When he was at risk of dismissal he orchestrated a political campaign with the aid of external support over issues that proved to be unfounded, resulting in an adverse action claim. After

the employer and staff were criticised heavily by the applicant/other external parties involved, and conciliation failed, it was only during pre-trial orders that his lies about qualifications were clearly established.

## Interviews with Employers – MAAP

**What were your Initial thoughts about engaging in the Program?**

- Just to help apprentices to give them an outlet that is independent from us. The mentor can then voice their opinions to us and see if there are any issues we can help them.

- I thought it was quite a good idea, it was very informative for the apprentices and for myself.

- Fantastic. The Program probably started 5 or so years too late, this should have happened many years ago. Full credit for the Program to happen. This is probably one of the best things to happen for the automotive industry.

- I thought it was a great idea as it gives the apprentices an avenue to talk about things without having to sit in the boss' office. As they are new to the workplace, talking to staff about any issues that they are having can be a bit intimidating, so having someone acting as a mentor for them is a positive thing.

**Has the program been beneficial to date?**

- Absolutely, recently one of our apprentices had issues with one of our co-workers. He's the types of person who wouldn't go seeking help from us. When Effie came here to chat with him he let it all out; Effie acted as a counsellor and a friend to the apprentice. The information that the apprentice couldn't relay to us, he could with Effie and the issue has been resolved.

- Yes, there's been a couple of issues that the mentor has highlighted regarding two apprentices that as an employer, I was not aware of. I can't elaborate what those issues are due to privacy reasons.

- It has; it's very good for the apprentices if there's someone looking after them. I'm not always kept informed about the apprentices' needs like what they are entitled to, and the program enabled us to keep up to date with that.

- Yeah it's beneficial for the industry. It allows the apprentice to voice their concerns to someone independent from the boss.

- Absolutely. It gives the apprentice another direction to go to and allows them to come and talk to them. It's very hard to retain apprentices and if you have a mentor coming around, they can give them some TLC. Sometimes the apprentice doesn't like to bother the manager, similar to how a student doesn't want to bother the principle if he has an issue. However, the mentor can give them reassurance.

**Has the Mentor been helpful to your Business?**

- Definitely, Dave made sure that we are providing to the apprentices. With David there as the mentor, we can talk to him about issues relating to the apprentice.

- Probably, the guy that comes in has had a good rapport with our employees; he has a chat about the business with us. He's not just a mentor; he sees a lot of other businesses around and talks about those businesses with us.

**Has the Mentor helped you overcome any issues or concerns with your Apprentice?**

- Yes, particularly in regards to incentives.

- Yeah, it most certainly has, one apprentice was having some troubles at home and the mentor that comes in has helped resolve some home issues that the apprentice was having as it was affecting his work.

**Are you happy with the level of contact? (Length and frequency of meetings)**

- Yeah, it's very good.

- Absolutely, I meet up with Rob every so often and have a chat with him. It's been positive.

**Has the Mentor provided useful information regarding your Business and Apprentice?**

- Yes, like the Tools for your Trade program and everything, he has information about that and has given it to the apprentice.

**Do you think this is a good Program for the Automotive Industry?**

- Yes because I don't see anything else like this available out there, other than the AiG mentoring program but the funding for that stopped and that's the reason we approached you guys.

- Yes, a lot of apprentices work for small employers and they don't have the resources to not only aid in the apprentices training, but also with things like counselling, healthy eating, life skills and so on.

- Absolutely, I think the generation has changed, they are different than the ones before them. We have to think about a lot of things nowadays when it comes to apprentices. Because of this, you have to counter these changes and the Program is the way to do it. Again, I'm sticking to my guns when I say that this Program should have happened 5 years ago.

**Are there any specific areas the Program has helped you overcome a challenge with your Apprentice?**

- We had issues with one, he had an instance where his father had passed away and we thought he wasn't interested anymore in the apprenticeship but when we asked, he said he was ok. I think it was good to have Dave there as a buffer between us and the apprentice, it was good to have an outlet for the apprentice to talk to as he wasn't comfortable talking to us about the issue. In this instance, Dave acted as a counsellor. He called him and checked on him.

**Do you think Mentoring is a good idea for Apprentices and VACC members to be involved in?**

- Yes, it's an additional support mechanism for the apprentice and it allows them to talk to someone that is not part of the business.

- Definitely, we got young apprentices coming to the workforce and they're not sure what they are entitled to and what's going to happen during their apprenticeship. When there is a mentor, it allows the apprentices to understand what's going on with things like wages and benefits. Dave made sure that this is what the apprentice should be getting. The mentor acts as a good buffer between the employer and the apprentice if there is an issue in the workplace.

- Yeah, extremely important I think, obviously the right guy doing the mentoring is also important – the guy that comes in has a great rapport with the apprentices.

**Would you like to use the service for future Apprentices?**

- Yeah absolutely

**Would you be disappointed if the service was no longer available?**

- Yes I'll be disappointed, one Dave is quite a good bloke. I just found him very helpful. It's good to run things past Dave. I just think it was a good service for us. If the program ends, I'll just have to keep up to date with the paperwork side of the apprenticeships.

- Absolutely, 100 percent disappointed. For the sake of the future of the country and the automotive industry, I hope it can be maintained. It's already a struggle to get people in the industry. Without something like this, we might as well say good bye to the industry in the next 10 years.

- Extremely disappointed, like I said, sometimes, the apprentices might not open up with their issues with us and the mentor helps with that. We will lose apprentices out of the blue sometimes, and since the mentoring program it's been less of it so the mentoring program must have something to do with it.

**Would you recommend it to other Businesses?**

- Yes I would without hesitation.

- Yeah, just to give some young guy some help.

- Yeah.

## Case studies of Structured Workplace Learning

Case study 1 (continued next page)

- Student was working at the business in Narre Warren for 18 months for one day a week
- Student was not even interested in panel beating and never has been

- Student got told that he must stay there in order to pass VCAL or it's an instant fail

Case study 2

- Student was working at a business in Narre Warren for one day a week for a few months
- The student was told to move rocks and do landscaping, weeding, etc.
- The student was paid $5 a day to do work unrelated to the business

Case study 3

- Student was working at a business in Narre Warren from February 2013 to September 2013 (7 months)
- The student was told to move rocks and do gardening, rather than doing work related to the business

Case study 4

- Student has been doing Structured Workplace Learning for two years in a business at Epping
- The employer wanted to put the student on a School-based Apprenticeship and Traineeship (SBAT) program at the end of year 12

Case study 5

- Student was working in a business in Seaford for a full year at one day a week for $5 a day
- Student came to VACC for an interview and had never heard of the SBAT program. Student subsequently applied for a full time position with no credits

Case study 6

- Student worked for a business for 12 months, one day a week for $5 a day
- To the school's credit, they have helped the student apply and supported the student's move into the SBAT program. The student is undertaking year 12 in 2014

Case study 7

- Student has done 18 months of Structured Workplace Learning
- Undertook jobs which included car servicing, re-clutch assemblies, engine overhaul, and suspension work

Case study 8

- Owner/Manager rang VACC's hotline and wanted advice on a student that the business was taking on for the following year for Structured Workplace learning
- The school advised that the student has to be there at least one day per week all year long at $5 a day
- The manager was worried about being liable to back pay at the correct award rates
- VACC recommended SBAT program and the employer was keen
- VACC subsequently gave them details of the local Group Training Organisation

Case study 9 (continued next page)

- Student travelled for 45 minutes each way every Friday for 12 months
- Student was paid $5 a day on the promise of an apprenticeship

- After the full, the student was told not to come back and was not offered the job
- The student applied with VACC as an SBAT student in February 2014

Case study 10

- A teacher at the school put her own son at a local dealership for $5 a day for 2 years
- The student was doing all sorts of productive work
- The student was not interested in automotive and the shop was never going to give the student a job after school

Case study 11

- Student undertook Structured Workplace Learning for 2 years at a business
- Student was paid $5 a day which included weekdays and Saturdays
- The business never intended to offer an apprenticeship to the student

## VACC members' views on the VET system

- *I have noticed that a significant drop in resources/funding has made it more difficult for TAFE's to perform.*
- *Lack of classroom training – apprentice paid fees but did not have to attend any school training.*
- *The RTO is very hard to deal with. No communication between TAFE and the employer. The RTO didn't let us know that our last apprentice had been injured at trade school. Not one visit from the trade school teacher. No reports on how the apprentice is doing. Changing clock releases to Wednesday to Tuesday means that the apprentice can't get weekly train.*
- *I've noticed that more training is now up to employers rather than the TAFE system.*
- *They don't seem to care about teaching the required material. Just numbers.*
- *Feel the kids are getting pushed through the system too quick.*
- *Lack of accountability. Out of date training. Lack of detail and interest toward the apprentices.*
- *Lack of mentor over apprentice. Apprentices are not learning. Teachers/instructors are too care-free on students' progress.*

## Case studies of unscrupulous private RTOs

**RTO 1 (continued next page)**

**Case 1:** RTO 1 visited a VACC member's business to tell the member that they will up skill him to a new Certificate III and also provide him a Certificate IV in Business Management. RTO 1 said that it would receive $9,000 worth of government funds and therefore it would cost the member nothing to undertake the training. The member asked if he is required to do any exams and was told by RTO 1 that the only requirement was for RTO 1 to come to the member's work place and watch him fix cars.

**Case 2:** RTO 1 also visited another VACC member's site to sell a Certificate IV in automotive.

The member and others within the work place signed up to the program and heard nothing from RTO 1 afterwards. The member contacted RTO 1 and realised that it was an international college. The member now does not know how his details are being used by RTO 1.

**RTO 2**

RTO 2 visited a VACC member's site saying that for the years 2014/2015, it is a requirement for everyone to have a current training qualification, otherwise the person/company could receive a fine of $50,000 to $250,000. The manager from the member site noted that RTO 2 had a flyer that showed that a Government fine of $50,000 to $200,000 will occur if this qualification is not taken. When the member asked to keep a copy of the flyer, RTO 2 refused to give it to him.

**RTO 3**

RTO 3 came to a VACC member's site to provide "cross training" for the member's employees. RTO 3 signed up all of the member's panel beaters into spray painting qualifications and all of their spray painters into panel beating qualifications. As both qualifications are listed under the National Skills Needs List (NSNL), the employees were eligible to undertake a second apprenticeship. In addition, employees are mature age, hence the business will receive $8,000 for each employee undertaking a second apprentice. VACC notes that this is a major issue for the automotive industry as these cases are counted towards the apprenticeship numbers. The continuation of this loophole will consequently result in automotive skills shortage list to become defunct.

It should also be noted that RTO 3 also provided OHS auditing services for the member. However upon analysis, the consultants from RTO 3 did not have an OHS background and any OHS paper work conducted contained inaccurate OHS legislation. Further, the documentation that RTO 3 provided to the member, despite it being customised for the member's business, had other company names not related to the business.

**RTO 4 (continued next page)**

**Case 1:** In 2012, a representative from a private RTO (now defunct due to deregistration) came to a VACC member's business without an appointment and asked if any workers would like to upgrade their qualifications for free. The member spoke to the representative and explained that he had a light vehicle qualification and had started his heavy vehicle course but never finished it. The representative said that he would be eligible and went away to commence the process. The member said that after many months, they had not heard anything further. In early 2014, a representative from RTO 4 came to the business and said that they have been appointed to take over from the previous private RTO and would assess the member.

The member again explained his situation and was told that RTO 4 would conduct a Recognition of Prior Learning (RPL) assessment for him for his Heavy Vehicle qualification. The member was given a "pre-course survey" to complete. When the member looked at the survey, he asked the representative if it was the correct one as it did not have anything to do with Heavy Vehicles in the material. RTO 4 replied saying that it was the correct one.

RTO 4 asked the member to "stage some photos." When the member questioned the mock photo, he was told "don't worry about it, the assessors wouldn't have a clue what they are looking at." As the member is employed at a heavy vehicle business, the photos were of him working on heavy vehicles. RTO 4 then took copies of the member's Medicare card, his driver's licence and some work invoices. The member was then asked to sign three times on a blank screen of an iPad. RTO 4 made an appointment with the member to meet him at his home to record some answers to automotive-related questions.

Shortly after, the member received a qualification in the mail for AUR30405 Certificate III in Automotive Technology (Light Vehicle). When the member rang to explain that it was the wrong qualification, he was told that they are not registered to provide Certificates in Heavy Vehicle Technology.

**Case 2:** A representative from RTO 4 called to see a VACC member. The representative told the member that he would not be able to perform Roadworthiness assessments any longer as his qualification was too old and that he could upgrade it to the new qualification for free. The representative asked the member if he had any other staff that should get an upgrade as well. The member told the representative that he had two other staff, one was a Panel Beater and the other an Automotive Electrician that also had old qualifications. They each filled out an application form and the representative took copies of their licences and Medicare cards. The representative left each of them a pre-course survey and said a trainer would come out in the near future.

After the representative left, the member decided to do some checking and rang the VACC Area Manager to confirm what he had been told. The area manager informed the member that none of the information given was true and then contacted VACC Education and Training department to advise of the member's concerns.

The member then rang RTO 4 and said that he wished to cancel all three enrolments. He was inform that it would be done. The following week a trainer from RTO 4 came out to the business and the member informed the trainer that all of the enrolments had been cancelled. The trainer said no problem and left. A few weeks later, all three received a certificate in the mail for AUR30405 Certificate III in Automotive Technology (Light Vehicle). No work was completed nor any evidence collected.

**RTO 5 (continued next page)**

**Case 1:** A VACC member has been receiving calls up to five times a day for RTO 5. RTO 5 has been told three times in a single day to stop calling. There has been two representatives from RTO 5 phoning the member's business, with both representatives being abusive towards the member over the phone. One representative of RTO 5 threatened the member, saying that he would give his family a bad Christmas as he is a member of a certain terrorist organisation. The member called back RTO 5 and told them that he would phone the Australian Federal Police if he received another call from them.

**Case 2:** Another VACC member has also complained about RTO 5. This time RTO 5 was offering the member Recognition of Prior Learning (RPL) for Certificate III, then Certificate IV after the completion of the Certificate III. The member was concerned as she had given her personal details, including her partner's driver's licence, to RTO 5. RTO 5 has falsely

promoted that they are associated with VACC. In addition, they have also noted that they have an affiliation with the Institute of Automotive Mechanical Engineers (IAME) the Society of Automotive Engineers (SAE). Further, RTO 5 is not on the RPL Provider List, despite RTO 5 promoting RPL programs.

**RTO 6**

**Case 1:** A VACC member was asked by RTO 6 to pay a join up fee of $250 for his qualified mechanic to undertake a Certificate III in Diesel Mechanics. RTO 6 promised the member that he would subsequently receive $8,000 in Federal Government subsidies and $1,500 in State Government.

**Case 2:** One VACC member had a representative from RTO 6 visit his business. The representative told the member that the government will be making it mandatory that all mechanics hold the Certificate III qualification, hence the member's staff should update their qualifications before the new laws take place.