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Fair Work Amendment (Remaining 2014 Measures) Bill 2015

22 December 2015

Australian
Chamber of Commerce
and Industry

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and Industry

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WORKING FOR AUSTRALIA

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Summary of Recommendations

Recommendation 1: The Australian Chamber supports the proposed amendments set out in Schedule 1, Part 1 of the Bill which will restore the longstanding and historical position with respect to the payment of annual leave loading on termination when the leave is not taken.

Recommendation 2: The Australian Chamber supports the amendments within Schedule 1, Part 2, Item 4 of the Bill which seek to repeal subsection 130(2) of the FW Act with the effect that an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue leave under the FW Act during the compensation period.

Recommendation 3: The Australian Chamber supports the amendments proposed in Schedule 1, Part 4 of the Bill which will, in the Australian Chamber's view, save relevant parties the time and expense associated with applications being made to the Fair Work Commission to avoid the transfer of an old employer's industrial instrument to the new employer in circumstances where the employee transfers voluntarily.

Recommendation 4: The Australian Chamber supports the measures contained with Schedule 1, Part 5 of the Bill which takes steps to restore much needed balance to union entry privileges.

Recommendation 5 The Australian Chamber supports the amendments set out in Schedule 1, Part 6 of the Bill, maintaining the view that the proposed amendments would improve the efficiency of unfair dismissal matters by allowing for applications to be dealt with on the papers and would in-turn reduce the costs incurred by relevant parties.

Recommendation 6: The Australian Chamber supports the amendments proposed in Schedule 1, Part 3 of the Bill, maintaining the view that the proposed amendments will resolve ongoing disputation about the content of and overcome the practice of unions trying to limit the scope of individual flexibility arrangements and well as making these arrangements a more attractive option.

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1 Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee (Committee) in relation to the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth) (Bill). The Bill revives important amendments from the *Fair Work Amendment Bill 2014* (Cth) (FWA Bill) that did not pass the Senate in October 2015 (Remaining Measures). The Australian Chamber commends the Senate on its passage of four of the measures contained within the FWA Bill and understands that more time would allow for detailed consideration of the Remaining Measures. This is reflected in the Bill's Second Reading Speech made upon its introduction to the House of Representatives where it was noted:

> *Earlier this year, after constructive engagement between the government and crossbench senators, agreement was reached on four of the measures in that former bill. It was decided with the crossbench, so as to not delay passage of the agreed measures, those measures would be passed while discussions continued on the remaining measures.*[1]

It is important to recognise from the outset that the Bill responds to a number of outstanding recommendations as contained within the report *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation,* arising from the independent Fair Work Review Panel's (Review Panel) review of the *Fair Work Act 2009* (Cth) (FW Act) initiated by the previous Government in 2012.

As noted in the Bill's Explanatory Memorandum, the Bill seeks to amend the FW Act to:

- respond to Review Panel recommendation 6 by providing that, on termination of employment, untaken annual leave is paid out as provided by the applicable instrument;
- respond to Review Panel recommendation 2 by providing that an employee cannot take or accrue leave under the FW Act during a period in which the employee is absent from work and in receipt of workers' compensation;
- respond to Review Panel recommendations 9, 11, 12 and 24 by:
    - requiring flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of individual flexibility arrangements with 13 weeks' notice;
    - requiring flexibility terms in enterprise agreements to provide, as a minimum, that individual flexibility arrangements may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading;
    - confirming that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employee is better off overall under an individual flexibility arrangement and require individual flexibility arrangements to include a statement by the employee setting out why he or she

[1] Mrs Andrews, Second Reading speech: *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* , 3 December 2015 accessible in Parlinfo Search.

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believes the arrangement meets his or her genuine needs and leaves him or her better off overall at the time of agreeing to the arrangement; and
    - providing a defence to an alleged contravention of a flexibility term where the employer reasonably believed that the requirements of the term were complied with at the time of agreeing to a particular individual flexibility arrangement;
- respond to Review Panel recommendation 38 by providing that there will not be a transfer of business under Part 2-8 of the FW Act when an employee becomes employed with an associated entity of his or her former employer after seeking that employment on his or her own initiative before the termination of the employee's employment with the old employer. Similar amendments are also made in relation to Part 6-3A of the FW Act;
- amend the right of entry framework of the FW Act by:
    - repealing amendments made by the *Fair Work Amendment Act 2013* (Cth) that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;
    - providing for new eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers;
    - repealing amendments made by the *Fair Work Amendment Act 2013* (Cth) relating to the default location of interviews and discussions and reinstating pre-existing rules; and
    - expanding the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- respond to the Review Panel recommendation 43 by providing that, subject to certain conditions, the Fair Work Commission is not required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application under section 399A or section 587.

These Remaining Measures are consistent with the Government's pre-election policy that was presented to Australian voters prior to its election in 2013. Specifically, the Government's reform mandate was reflected within *The Coalition's Policy to Improve the Fair Work Laws.*

The amendments within the Bill are proposed against the backdrop of a workplace relations system that, in the Australian Chamber's view, was designed for another era and is in need of broader reform. In March and August this year, the Australian Chamber made comprehensive submissions to the Productivity Commission's inquiry into the workplace relations framework seeking changes that, in the Australian Chamber's view, would reform the framework in a way that would ensure it is small-business friendly, pro-employment and more receptive to changing domestic and international conditions.

Notwithstanding the need for broader reform, the Remaining Measures contained within the Bill represent incremental reform, addressing key concerns and anomalies resulting from the FW Act's current operation. This submission is to be read in conjunction with the Australian Chamber's

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submission to the Senate Education and Employment Legislation Committee's Inquiry into the *Fair Work Amendment Bill 2014,* dated April 2014 (2014 Submission) as well as its February 2012 submission in response to the Australian Government's inquiry into the FW Act.

The current Bill's Second Reading speech notes:

> *The bill is being introduced to allow for the continuation of constructive discussions with crossbench senators on these fair reforms that will bring some balance back to the workplace system…*[2]

The Australian Chamber is happy to contribute to these constructive discussions and thanks the Committee for its reconsideration of the Remaining Measures within the Bill. The Australian Chamber is available to engage in further dialogue with the Committee or any senator who may have remaining doubts regarding the importance of the Bill's urgent passage. While the Australian Chamber agrees that the Remaining Measures will bring 'some' balance back to the workplace relations system, our primary position is that further and far more fundamental reform of the system is required.

2 Payment of annual leave upon termination of employment

Schedule 1, Part 1 of the Bill seeks to amend section 90(2) of the FW Act to provide that upon termination of employment, the employer must pay an employee for a period of untaken annual leave based on the employee's rate of pay. Schedule1, Part 1, Item 3 proposes to do this by repealing the existing subsection 90(2) and substituting it with:

> *(2) If, at the time (the **termination time**) when the employment of an employee ends, the employee has a period of untaken paid annual leave:*
>
> *(a) the employer must pay the employee a rate for each hour of the employee's untaken paid annual leave; and*
> *(b) that rate must not be less than the rate that, immediately before the termination time, is the employee's base rate of pay (expressed as an hourly rate).*
>
> *Note: See also section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).*

This important amendment will clarify that upon termination of employment, untaken annual leave is paid out as provided by the applicable industrial instrument. Significantly, it will have the effect that annual leave loading will not be payable on termination unless an applicable modern award, enterprise agreement or contract of employment expressly provides for it on termination.

Currently, section 90 of the FW Act provides as follows:

[2] Mrs Andrews, Second Reading speech: *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* , 3 December 2015 accessible in Parlinfo Search.

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Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.
(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

The proper construction of subsection 90(2) has been a source of contention and remains the subject of proceedings before the Fair Work Commission as a part of the four-yearly review of modern awards. During the annual leave common issue proceeding, the ACTU has contended that subsection 90(2) has the effect that all amounts that might be paid by an employer during a period of annual leave (whether such amounts derive from contracts of employment, employment policies, enterprise agreements or awards) are required by the FW Act to be paid on accrued leave on termination of employment.

The Australia Chamber maintains the view that this cannot have been the intended application of the FW Act. The Review Panel acknowledged that such an interpretation would mean that longstanding arrangements under awards and enterprise agreements would be disturbed.[3] The Australian Chamber's view is supported by the regulatory analysis set out within the Explanatory Memorandum to the FW Bill. In particular, the regulatory analysis did not contemplate any increase in costs for employers as a result of the new annual leave provisions of the NES, stating:

Annual leave

57. The NES will not change the coverage or quantum of the annual leave entitlement. However, the NES will replace complex formulae in the current Standard about the accrual and crediting of paid annual leave with a simplified system – paid annual leave simply accrues and is taken on the basis of an employee's 'ordinary hours of work'. The NES enables modern awards to make provision for additional leave for shift workers and for cashing out of annual leave with appropriate safeguards.

58. As noted above, the major regulation change under this NES is to simplify complex rules around annual leave accrual. The Department is unable to quantify the regulation impact of the simplification of these rules and formulae.[4]

The Explanatory Memorandum to the FW Bill also stated

Annual leave: both the Standard and the NES provide the same coverage and quantum of annual leave entitlement. A key change under the NES is a simpler manner of accrual and

[3] McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012, p. 100.
[4] Explanatory Memorandum, *Fair Work Bill 2009* (Cth), pp. xvii-xviii.

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> *the concept of 'service' for calculating the entitlement. Paid annual leave will accrue and then be taken on the basis of an employee's ordinary hours of work. The NES will enable modern awards to supplement the NES if the effect of those terms is not detrimental…* [5]

In contrast to the approach adopted where other NES entitlements resulted in increased costs for employers, these statements within the Explanatory Memorandum did not indicate that the legislature intended to alter the quantum of statutory entitlements for annual leave on termination that existed under the *Workplace Relations Act 1996* (Cth) (WR Act).

The Bill's Explanatory Memorandum notes that:

> *Of the current 122 modern awards, 113 contain an entitlement to annual leave loading. Around 17 per cent (or 19 modern awards) provide that annual leave loading is not paid on termination and around 68 per cent (77 modern awards) are silent on whether it is payable.*[6]

It should not be lost that employers, in good faith and in attempting to comply with their obligations under the complex award structure rely on the text of the awards, text which was included when the modern awards were made in 2010 despite the existence of section 90(2) of the FW Act and which remained unaltered during the two-yearly review of modern awards. It is also likely that employers will have applied their understanding of how unused annual leave was historically required to be paid on termination.

This amendment would operate in a way that is fair to all parties. It was not formulated with the intention of taking entitlements away from employees but instead seeks to restore the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay unless the award or enterprise agreement expressly provides for a more beneficial entitlement.

It is very important to bear in mind that the amendment proposed does not disrupt arrangements where an award or agreement expressly provides that annual leave loading is payable on termination. Employees who have always enjoyed the benefit of such arrangements will not be disadvantaged by the amendment.

The proposed amendment also broadly reflects recommendation 6 made by the Review Panel which was framed in the following terms:

> ***Recommendation 6****: The Panel recommends that s. 90 be amended to provide that annual leave is not payable on termination unless a modern award or enterprise agreement expressly provides to that effect.*

[5] Explanatory Memorandum, *Fair Work Bill 2009* (Cth).
[6] Explanatory Memorandum, *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth), p. xxxiii.

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In making this recommendation the Review Panel acknowledged that this recommendation was "[b]acked with the weight of past practice" and that a contrary interpretation of the requirement in section 90(2) "would have the most negative impact on affected small businesses".[7] The amendments made by Schedule 1, Part 1 of the Bill give effect to the Review Panel's recommendation and the intent of the amendments is clearly stated within the Bill's Explanatory Memorandum as follows:

> *The amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.*[8]

The Australian Chamber urges the Committee to consider that these amendments are not intended to do any more than restore the historical status quo and this regard, should not be considered controversial or in any way unfair. Indeed, it would be unfair to expect employers, including small business employers, to meet the cost of paying annual leave loading on termination when this had not historically been required, intended by the statute or where their industrial instrument expressly stated that they did not have to pay annual leave loading on termination. It would be monumentally unfair if what seems to have been a drafting error was to result in breaches and liabilities for employers due to an adverse interpretation of the current provision. The emergence of recent case law on this issue resulting in findings of employer liability mean the passage of these amendments is now critical.

A further amendment is proposed in Schedule 1, Part 1, Item 2 of the Bill which includes additional text at the end of Note 2 after subsection 55(4) of the FW Act providing that supplementary terms that may be included in modern awards include (for example) terms:

> *(c) that provide that if, when the employment of an employee ends, the employee has a period of untaken leave, the employee is to be paid the amount that would have been payable to the employee had the employee taken that period of leave (that amount may be higher than the amount required by subsection 90(2)).*

The Australian Chamber does not consider that this further amendment proposed in Item 2 is necessary as section 55(4) of the FW Act already provides that award and enterprise agreement terms supplementary and ancillary to the NES may be included to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the NES. Notwithstanding this, the Australian Chamber does not oppose its inclusion should the Committee consider that it will provide greater confidence that awards and enterprise agreements are

[7] McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation* , June 2012, p.100

[8] Explanatory Memorandum, *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth), p. 2.

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permitted to provide more beneficial terms regarding payment of outstanding annual leave on termination than the minimum statutory standards provided by the NES.

Recommendation 1: The Australian Chamber supports the proposed amendments set out in Schedule 1, Part 1 of the Bill which will restore the longstanding and historical position with respect to the payment of annual leave loading on termination when the leave is not taken.

The Australian Chamber recommends that these amendments be passed as a matter of urgency with retrospective effect from the date of the current provision's operation.

3 Taking or accruing leave while receiving workers' compensation

Schedule 1, Part 2, Item 4 of the Bill seeks to repeal subsection 130(2) of the FW Act with the effect that an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue leave under the FW Act during the compensation period. There has been uncertainty and controversy regarding the proper construction of section 130(2) of the FW Act since it took effect. The proposed amendment will address this and is strongly supported by the Australian Chamber.

The amendment responds to the following recommendation of the Review Panel:

> ***Recommendation 2:*** *The Panel recommends that s. 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.*

In making this recommendation and having observed that only two of Australia's jurisdictions unequivocally allow leave accrual while on workers compensation, the Review Panel found:

> *When employees are absent from work because of injury and/or disease, workers' compensation insurance is but one of several compensatory mechanisms that are now available. In some jurisdictions, for example, employees who have suffered transport accidents will receive payments through accident compensation schemes. The Australian Government has announced that it will implement a National Disability Insurance Scheme, and state and territory governments appear willing to participate as partners in this new and innovative strategy for people with disabilities. Given these changes, it does appear to the majority of the Panel to be a little anomalous that employees in two jurisdictions may accrue annual leave while receiving workers' compensation payments, whereas under the remaining schemes this may not be available. Furthermore, if the employee is receiving other injury payments or social security support, accrual of annual leave is not permitted. In the majority of the Panel's view this should be clarified by amending the FW Act to prevent*

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> *employees accruing annual leave while receiving workers' compensation payments, despite what is written to the contrary in state or territory workers' compensation laws.*[9]

The Review Panel also noted that "s. 130 of the FW Act is, regrettably in the majority of the Panel's view, not clearly worded" and that the situation was "confusing for affected parties and may involve costs – for example, in obtaining legal advice".[10]

The Australian Chamber strongly supports the amendments proposed within Schedule 1, Part 2, Item 4 of the Bill which reflect the fact that the majority of state and territory workers' compensation systems do not allow employees to accrue annual leave whilst on workers compensation and will inject clarity and consistency into the system by ensuring "*that all employees in the national system have the same entitlements in relation to the taking or accrual of leave during a period in which the employee is in receipt of workers' compensation*".[11]

As a matter of principle, it would seem an anomalous outcome to permit the accrual or taking of annual leave (intended for the purposes of rest and recreation) during a period in which the employee has not undertaken service with their employer because they have been out of the workplace and in receipt of payments under a statutory insurance scheme which typically focuses on recovery and rehabilitation.

The amendment does not produce an unfair outcome. Arguably, enabling a person to 'take a break' from their recovery and rehabilitation is at odds with the objects of an effective workers compensation system and a focus returning the employee to the workplace in accordance with the appropriate return to work plan and as soon as it is safe to do so.

Recommendation 2: The Australian Chamber supports the amendments within Schedule 1, Part 2, Item 4 of the Bill which seek to repeal subsection 130(2) of the FW Act with the effect that an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue leave under the FW Act during the compensation period.

The Australian Chamber recommends that the Committee seriously consider applying the amendment to all circumstances from the time that the employer became a national system employer, where, on the day after Assent, there has been no annual leave accrued and nor any taken or commenced by an employee on workers compensation.

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[9] McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation* , June 2012, pp. 99-100, with reference to Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates, 2010-11, pp 88-89.

[10] A McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation* , June 2012, pp. 99-100, with reference to Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates, 2010-11, p. 88.

[11] Explanatory Memorandum, *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth), p. viii.

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4 Transfer of business

Part 2-8 of the FW Act currently provides that where a 'transfer of business' occurs, the industrial instrument covering the old employer and employee will automatically transfer with the employee to the new employer. A transfer of business will generally be satisfied if:

- the employment of an employee of the old employer has terminated;
- within three months after the termination, the employee becomes employed by the new employer;
- the work performed for the new employer is the same or substantially the same as the work the employee performed for the old employer;
- there is a 'connection' between the old employer and the new employer (as described in any of subsections 311(3) to (6)) of the FW Act.[12]

If the above conditions are met, the FW Act's provisions currently have the effect that industrial instruments covering the old employer and employee transfer to the new employer. The industrial instrument will transfer even in circumstances where the transfer is at the employee's initiative. The only way to prevent this outcome is to apply FWC for an order to the effect that the instrument does not transfer. The Review Panel made the following comments in relation to voluntary transfers of this nature:

> *The question for the Panel is whether it is necessary to require the parties to apply to FWA on every occasion an employee voluntarily seeks to transfer to a similar position in a related entity. We believe it would be preferable to spare both parties the time and expense of making such an application. This could be achieved by amending s. 311(6). Such an amendment is unlikely to increase the risks of employees having their terms and conditions of employment diminished through transfers to associated entities.*[13]

This rationale is reflected in the following recommendation of the Review Panel:

> ***Recommendation 38:*** *The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.*

The Bill seeks to respond to this recommendation and Schedule1, Part 4, Item 19 proposes to include a new subsection 311(1A) which provides as follows:

> *(1A) However there is not a **transfer of business** if:*
>
> *(a) the new employer is an associated entity of the old employer when the employee becomes employed by the new employer; and*

[12] *Fair Work Act 2009* (Cth), s. 311(1).
[13] A McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation* , June 2012, pp. 99-100, with reference to Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates, 2010-11, p 206.

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(b) before the termination of the employee's employment with the old employer, the employee sought to become employed by the new employer at the employee's initiative.

Similarly, Schedule 1, Part 4, Item 20 proposes to add the following exception at the end of section 768AD of the FW Act which deals with the transfer of instruments applying to an employee of a state public sector employer:

(5) Subsections (2), (3) and (4) do not apply if:

(a) the new employer is an associated entity of the old State employer when the person becomes employed by the new employer as mentioned in paragraph (1)(b); and

(b) before the termination of the person's employment with the old State employer, the person sought to become employed by the new person's initiative.

(6) For the purposes of sections 768BL, 768BM and 768BN, assume that subsection (5) of this section had not been enacted.

These amendments are also consistent with the following recommendation made by the Productivity Commission in its report arising from its inquiry into the workplace relations framework:

RECOMMENDATION 26.4

The Australian Government should amend the Fair Work Act 2009 (Cth) so that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer.[14]

The rationale underpinning the Productivity Commission's recommendation is reflected in the following statement made in its Final Report:

There are two particular considerations for not applying transfer of business provisions to voluntary switches:

- *voluntary employee movements between associated employers are not uncommon and in many cases benefit the employee and the employers*
- *applications for exemptions involve costs to all parties, which, in some cases, may discourage the employer from agreeing to the transfer.*[15]

Consistent with the Australian Chamber's 2014 submission, the Australian Chamber supports the amendments set out in Schedule 1, Part 4 of the Bill to save the relevant parties the time and expense associated with applications being made to the FWC to avoid the transfer of an old employer's industrial instrument in circumstances where the employee wants to transfer for his or her personal reasons.

[14] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 843.
[15] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 841.

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While these amendments would improve things, the Australian Chamber maintains that the current transfer of business rules are not good policy. They only allow for change so long as there is no change. The rules unduly restrict the capacity of employers to restructure their businesses, create a disincentive to outsource and for entrepreneurs to offer better ways of doing things to the market. The Australian Chamber has expressed its concerns relating to the transfer of business rules in a number of submissions including its 2014 submission, March 2013 submission to the Productivity Commission's inquiry into the workplace relations framework[16] and February 2012 submission in response to the Australian Government's inquiry into the FW Act.[17]

Under the current workplace relations framework, transfer of business is not confined to the transfer of industrial instruments. It also imposes the transfer of existing and future legal liabilities accrued with the former employer onto a new employer. As the Australian Chamber indicated in its submission to the Senate Committee on the *Fair Work Bill 2008* (Cth), feedback from employers indicates the effect of the changes to the former transmission of business provisions has been the following:

- diminish the likelihood of a purchaser keeping on existing employees;
- make it difficult for a purchaser to undertake changes to stabilise or restructure the business, or alter inefficient work practices;
- increase the chances of industrial disputes on the sale of a business;
- reduce the purchase price of commercial arrangements for the sale of business if inefficient work practices have to be inherited.

The Productivity Commission's Draft Report into the Workplace Relations Framework also provided some valuable insights into the concerns employers and their representatives have in relation to the current provisions, summarised as in Box 22.1 of that report as shown below. In arriving at recommendations within its final report that are aimed at reintroducing balance to the transfer of business provisions, the Productivity Commission made a number of relevant comments and suggestions, including:

- *Transfer of business provisions need to balance competing goals. They should not frustrate structural adjustment or limit employment opportunities; but nor should they allow an employer to restructure their business specifically to avoid the application of an industrial instrument (typically an unwanted enterprise agreement).*
- *Currently, the provisions protect the latter at the expense of the former and some re-balancing should occur.*
    - *The object of the provisions — currently to provide a balance between the protection of employees' terms and conditions and the interests of employers in running their enterprises efficiently — should be expanded to also encompass the interests of continuing employment for the transferring employees.*

[16] Australian Chamber of Commerce and Industry, Productivity Commission Inquiry into the Workplace Relations Framework, March 2015, pp. 163- 166.
[17] Australian Chamber of Commerce and Industry, Inquiry into the *Fair Work Act* 2009, February 2012, pp. 127-128.

- *Any employment agreement transferred to a new business should automatically terminate 12 months after the transfer, except for transfers between associated entities.*
- *Voluntary movements between associated entities, at an employee(s) initiative, should be exempt from the provisions entirely, with the transferring employee(s) automatically covered by the new employer's employment conditions.*[18]

[18] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 827.

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Box 22.1 ***Selected comments on transmission of business provisions***

A number of inquiry participants argued that the transfer of business provisions in the FW Act make it harder for investors to turn around struggling businesses. As a result, in some cases, they can act as a deterrent to much needed investment. The Australian Mines and Metals Association argued:

> *… [t]he current transfer of business rules are acting as a disincentive to employment by imposing foreign and inflexible [workplace relations] arrangements from previous businesses, including bureaucratic public sector entities, onto new businesses, preventing them from being more efficient than the old (sub. 96, p. 341).*

Bluescope Steel concurred. It submitted:

> *… [t]here are circumstances where provisions in an enterprise agreement have contributed to poor business performance, and the present provisions of the Act that preserve the agreement, combined with the fact that it would remain in force after its nominal term (if not replaced by agreement) are a major disincentive to a prospective buyer. The outcome can be business failure and the loss of jobs, instead of the possibility of an acquisition and turnaround and maintenance of jobs (sub. 58, pp. 8–9).*

Several participants noted that the transfer of business provisions, as they are currently written, 'do not necessarily serve to secure employment of transferring employees or safeguard better terms and conditions because they may act as a disincentive to take on existing workforces' (Australasian Railway Association, sub. 155, p. 9). Given public sector awards and agreements have traditionally been more favourable than those in the private sector, this often occurs when public sector entities are privatised, or their functions outsourced to the private sector. The Chamber of Commerce and Industry of Western Australia submitted that:

> *… [a]s part of the amendments to the [Fair Work] Act in 2013, the transmission of business provisions were extended to provide that state instruments transfer where government services are outsourced. Our discussion with employers affected by these provisions has revealed that they have a very clear policy of not engaging any existing employees. This is due to the incompatibility between public sector agreements and the operation of private sector organisations. This inevitably means loss of employment for these workers (sub. 134, p. 69).*

Other participants noted the inefficiency of having to make an application for the Fair Work Commission to prevent the transfer of instruments where the employee has moved between associated entities voluntarily. Qantas submitted that:

> *… [u]nder the FW Act, Qantas has been required to make numerous costly and resource intensive applications to the FWC for orders to prevent the transfer of instruments in these circumstances. In some cases, staff have lost opportunities as a direct result of these provisions because of the time periods involved in seeking union cooperation in any approach to the FWC. No Qantas application has been rejected; equally each application takes considerable resources to process for what, in all cases, are voluntary moves. It is a clear example of the FW Act working to restrict flexibility (sub. 116, p. 14).*

Asciano agreed. It noted that these provisions 'cause considerable complexity when our employees seek to access opportunities within other employer members of the Asciano group, and therefore have the potential to restrict career progression and redeployment opportunities within the group' (sub. 138, p. 13).

A number of participants advocated large scale changes, such as the reinstatement of the provisions that were in place prior to the FW Act, including the Australian Chamber of Commerce and Industry (sub. 161, p. 166) and the Master Builders Association (sub. 157, p. 69), or greater protections for employees, such as the Australian Council of Trade Unions (sub. 167, p. 110) and the Australian Services Union (sub. 128, p. 18).

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The Productivity Commission also made a number of important observations in its Draft Report, including:

> *While protecting transferring employees is the primary focus of the transfer of business provisions, it should not occur at all costs. As discussed in detail in chapter 4, excessively generous entitlements do not come for free. They can adversely affect employment, consumer prices and future wage increases. As a result, there may be some instances where the cost to the employee of exempting them or varying a transferrable instrument yields greater (yet possibly more diffuse) benefits to the broader community.*
>
> *There can also be impacts on behaviour. If this threshold is recognised by new employers, not only might they be dissuaded from making applications (even where they offer net benefits), but, more importantly, they might also baulk at taking on transferring employees with cumbrous terms and conditions of employment in the first place.*[19]

In its final report and having sought further information about the operation of the transfer of business provisions the Productivity Commission has found:

> *The transfer of business provisions create several potentially high frictions for labour mobility (and associated with that, the mobility of physical capital, since the two are often interdependent).*
>
> *A new employer may face significant costs even if it agrees to employ some or all of the transferring employees. For instance:*
>
> - *unit labour costs may be higher*
> - *an employer may have to operate multiple payroll systems*
> - *the period of service of an employee is carried over from the previous employer, with effects on entitlements and the application of unfair dismissal provisions*
> - *productivity may be lower if the employment arrangements for the transferring employees are only partly compatible with the operating environment of the new enterprise. For example, the incompatibilities may impose restrictions on the nature of, and way in which tasks can be performed, scheduling, rostering and leave*
> - *differences in the conditions of employees undertaking the same work may create conflict differences in the nominal expiry date of the agreements can also lead to multiple agreement negotiations which will add to costs.*
>
> *Transfer of business provisions may also discourage the reallocation of employees within an entity. Large firms are sometimes covered by multiple industrial instruments at different sites or for different associated entities. These separate business entities may have different working environments that require different skills and work practices. Under current regulatory arrangements, movements between the entities can make it difficult to maintain efficient operating arrangements, which can impede the movement of employees*

[19] Productivity Commission 2015, *Workplace Relations Framework*, *Draft Report,* Canberra, pp. 755-756.

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> *to jobs where their skills are best used (even in circumstances where the worker gives their consent and there is no threat of job loss if they do not accede). For instance, Asciano noted that these provisions 'cause considerable complexity when our employees seek to access opportunities within other employer members of the Asciano group, and therefore have the potential to restrict career progression and redeployment opportunities within the group' (sub. 138, p. 13).*[20]

The Productivity Commission also provided a practical example of the operation of the provisions in the context of a transfer of business from Medibank to Sonic HealthPlus which, with the FWC declining to make orders to the effect that the instrument from the old to new employer would not transfer, would mean that employment could only be offered to 60 of the 300-400 employees made redundant as a consequence of the transfer, as opposed to 159 of these employees.[21] The Productivity Commission noted that the employees likely to be made redundant in this case worked in regional areas where it might be more difficult to find alternative employment.[22] This cannot be considered to be anything other than a highly unsatisfactory outcome.

The Australian Chamber considers that the current transfer of business rules sit poorly with the objects in s.3 (a) of the FW Act which intends laws that are flexible for businesses and promote productivity and economic growth. As with other significant changes introduced by the FW Act, they were not foreshadowed and were not subject to the pre-legislative review process of the Office of Best Practice Regulation in their initial iteration with the enactment of the FW Act and their expansion with the *Fair Work Amendment (Transfer of Business) Act 2012* (Cth). Both Bills giving rise to those pieces of legislation received the Prime Minister's exemption. The transfer of business rules disturbed established principles about transmission which had been developed by the High Court over many years, a fact confirmed by the FW Act Review Panel when it stated "The transfer of business provisions under the FW Act are a departure from the previous arrangements and are novel in many ways".[23]

The former "transmission of business" provisions under the WR Act which provided for "transmission of business" were intended as anti-avoidance provisions to deter employers from transferring employees into what was essentially the same business to avoid the operation of an agreement or a respondency based award and over time the High Court, developed rules, which (subject to the emergence of grey areas) were understood, more balanced, workable and did not act as a major disincentive for innovation nor for incoming employers to take on existing staff.

The *Fair Work Amendment (Transfer of Business) Act 2012* (Cth) also amended the FW Act to provide that any state industrial instruments applying to an employee of a state public sector employer would transfer with the employee when there is a transfer of business from that employer to a private sector employer. This Act received a Prime Ministerial exemption from assessment by the Office of Best Practice Regulation.

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[20] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p.p. 832-833.
[21] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 836.
[22] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 836.
[23] Productivity Commission 2011, *"Economic Structure and Performance of the Australian Retail Industry",* Report no. 56, Canberra, p. 208.

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The effect of the amendments was that the previous approach of negotiating transmissions of business and transfers of employment from state public sector employers which accommodated movement into the private sector and the nature of the employees involved is now no longer lawful. Those transfer of business provisions materially impact the potential for efficiency gains, and the state public sector employers' decisions about whether to retain, transfer, re-size or redirect or close. A clear impact of the amendments has been to reduce the likelihood that the new business service provider will engage former state public sector employees.

The Australian Chamber does not consider that those amendments represented good policy. They have created a disincentive to outsource by locking in public sector terms and conditions of employment, no matter how restrictive, costly or poorly suited to enterprise they are. By removing the pressure of credible competition they create a disincentive for public sector reform that may drive efficiency, better services and result in savings for taxpayers.

The Productivity Commission has made recommendations extending beyond those contained within the Bill and which warrant further consideration and discussion with the objective of achieving reforms that give greater weight to opportunities for continuing employment in transfer of business situations.[24] Specifically, it has made the following recommendations in its final report:

> *RECOMMENDATION 26.1*
>
> *The Australian Government should give the Fair Work Commission more discretion to order that an employment arrangement (such as an enterprise agreement) of the old employer does not transfer to the new employer, where that improves the prospects of employees gaining employment with the new employer. This should be achieved by amending the object (at s. 309) of the transfer of business rules in the Fair Work Act 2009 (Cth) to include the interests of continuing employment for employees of the old employer. Consideration should also be given to whether this should be echoed in the list of factors the Fair Work Commission must take into account in ss. 318 and 320.* [25]
>
> *RECOMMENDATION 26.2*
>
> *The Australian Government should amend Part 2-8 of the Fair Work Act 2009 (Cth) to make clear that a new employer can make an offer of employment to an employee of the old employer conditional on the Fair Work Commission granting an order under s. 318 that the employee's employment arrangement would not transfer to the new employer.* [26]
>
> *RECOMMENDATION 26.3*
>
> *The Australian Government should amend Part 2-8 of the Fair Work Act 2009 (Cth) to provide that a transferring employment arrangement automatically terminates 12 months after the transfer, except in transfers between associated entities. The transferring employees should be permitted to commence bargaining for a replacement enterprise agreement nine months after the transfer. If a replacement agreement has not been*

[24] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 836.
[25] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 841.
[26] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 840.

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approved by the 12 month date, the transferring employees would automatically be covered by any other instrument covering the new employer, including the relevant modern award.[27]

RECOMMENDATION 26.5

The Australian Government should amend Part 2-8 of the Fair Work Act 2009 (Cth) so that an employment arrangement does not transfer between associated entities in situations where the employee is redeployed to avoid being made redundant.[28]

The Australian Chamber maintains its primary position that the transfer of business rules should be restored to the former longstanding provisions that existed under the WR Act and that there should be a maximum time limit for transferring industrial instruments. Nonetheless, it should be clear having regard to our primary position and the contextual overview of the current transfer of business rules we have provided that the amendments proposed in Schedule 1, Part 4 of the Bill are very confined, modest and reasonable.

Recommendation 3: The Australian Chamber supports the amendments proposed in Schedule 1, Part 4 of the Bill which will, in the Australian Chamber's view, save relevant parties the time and expense associated with applications being made to the Fair Work Commission to avoid the transfer of an old employer's industrial instrument to the new employer in circumstances where the employee transfers voluntarily.

Notwithstanding this, the Australian Chamber maintains its primary position that the transfer of business rules should be restored to the former longstanding provisions and there should be a maximum time limit for transferring industrial instruments.

5 Union entry to workplaces

From the perspective of unions, entry to sites provides a pathway to organise and represent. However uninvited lawful access supresses normal property rights and can infringe what is sometimes called the employee right to freedom from association (implicit in the freedom of association). A legislative judgement is required which balances economic costs and normal civil property rights against a socially acceptable level of representation and disruption. However, in its departure from the long standing system regulating union entry to workplaces prior to the commencement of the FW Act, the current framework has disturbed the appropriate balance.

The previous Government extended the ability for a union official to enter a private business for discussion purposes. Previously, the entering official's union had to be bound by the applicable award or agreement, and this restriction conditioned the union's eligibility rules. Modern awards no longer bind unions but the removal of this condition where agreements are in place, as well as removing it where the award applies, removes any condition on eligibility. Unions with no previous

[27] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 841.
[27] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 843.
[28] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 843.

history at a workplace, unionised or not, can now enter on the basis of an aspect of their coverage which overlaps, or is purported to.

As a result, unions have greater scope to enter for recruitment and organising purposes, provided they are entitled to industrially represent at least one employee for whom the entry is related.[29]

The Productivity Commission made the following draft recommendation in relation to the union entry to workplaces where there are no union members:

> ***DRAFT RECOMMENDATION 19.8***
>
> *The Australian Government should amend the Fair Work Act 2009 (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.*

In the Australian Chamber's view, this recommendation did not go far enough. The Australian Chamber has instead advanced the position that entry for discussion purposes should be conditional on the workplace at least having union members who actually invite the union to enter. One of the Australian Chamber's members, the Australian Mines and Metals Association (AMMA) has observed:

> *Union entry to workplaces under the FW Act increasingly sees unrepresentative and unsupported unions attempting to force their product (union membership and representation) on uninterested employees, who are well aware of what unions have to offer and choosing not to join or participate. Non-union members are exercising a fundamental right not to join a trade union and our rules around entry should better acknowledge and accommodate those rights, which are being exercised by 88% of private sector employees.*[30]

The changes the previous Government made to union entry rules gave rise to much debate about both frequency of entry and the location of discussions. While the independent Fair Work Act Review Panel appointed to review the FW Act in 2012 made recommendations regarding these issues that suggested changes that made some re-balance to the competing rights,[31] they were not taken up by the previous Government.

Instead it amended entry rules in 2013 by:

- giving the Commission the power to deal with disputes over frequency of entry (for discussions). However, the Commission can only make orders where the applicant employer or occupier can demonstrate 'an unreasonable diversion of the occupier's

[29] *Fair Work Act 2009* (Cth), s.484.
[30] Australian Mines and Metals Association, *Getting Back on Track: Delivering the Workplace Relations Framework Australia Needs*, 13 March 2015, p. 206.
[31] McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012, pp. 195 (Recommendation 35) and 197 (Recommendation 36).

critical resources',[32] that is, there is no excessively frequent entry if there is only a *reasonable* diversion of *critical* resources (read beneficially).The explanatory memorandum confirms this, describing the test as an 'appropriately high threshold';

- removing the section empowering the Commission to deal with disputes about the location to hold discussions by making the lunch room the default location in the absence of agreement between the union and employer/occupier.

AMMA has observed:

> *Due to the significant changes to union access laws on 1 July 2009, and again on 1 January 2014, employers are now faced with greater costs and more frequent disruptions to their businesses than before, with less control over visits and fewer consequences being applied to inappropriate behaviour by permit holders.*[33]

The Productivity Commission has also observed that:

> *Employee representatives can impose significant burdens and costs on employers by exercising rights of entry very frequently, due to:*
>
> - *the need to prepare and document the visit*
> - *the need to escort the permit holder around the worksite, particularly where workplaces have high health and safety risks*
> - *disruptions to the performance of work by employees.*[34]

While section 505A of the FW Act enables the FWC to deal with disputes about frequency of entry to hold discussions, orders can only be made where the FWC is satisfied that the frequency requires an unreasonable diversion of the employer's 'critical resources'. In this regard the Productivity Commission has observed:

> *In practice, this has proved a high bar. Employers are required to demonstrate that each visit is a critical issue requiring an unreasonable diversion of their resources. This test overlooks the possibility that excessive entries may impose large, unwarranted costs on an employer without necessarily diverting 'critical resources'. Indeed when considering excessive frequency of entries, it would seem more likely that it is the ongoing accrual of the incremental costs of each entry that would be most damaging to employers.*
>
> *A more fundamental concern, from a policy perspective, is that s 505A currently places a burden on the employer to provide that the costs of entry would be unreasonable and critical, with no consideration of the relative size of the benefits of entry to employees… At present s. 505A effectively assumes that the value of the benefits to employees of entries by representatives is equal to just less than the cost of an 'unreasonable diversion of the*

[32] s.505A(4).
[33] Australian Mines and Metals Association, *Getting Back on Track: Delivering the Workplace Relations Framework Australia Needs*, 13 March 2015, p. 205.
[34] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 906.

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employer's critical resources'. Where being used for tactical purposes, this is unlikely to be the case. In these circumstances, the costs of entry to a workplace should not have to be critical, before the merits of additional entry should be questioned.[35]

The amendments set out at Part 5 of Schedule 1 of the Bill reflect the amendments that were proposed by the *Fair Work Amendment Bill 2014* (Cth) which sought to restore part of the earlier balance by narrowing the circumstances of entry. In particular, it seeks to repeal changes introduced by the *Fair Work Amendment Act 2013* (Cth) which:

- required employers or occupiers to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations; and
- made lunch or meal rooms the default location for union officials to hold discussions or conduct interviews rather than a reasonable employer-designated location as was previously the case.

These amendments made by the *Fair Work Amendment Act 2013* (Cth) were not based on recommendations made by the Fair Work Act Review Panel and were strongly opposed by employers for reasons which included but are not limited to:

- with respect to the location for interviews and discussions:
    - there was no cogent evidence provided that suggested that it was necessary to depart from the pre-existing rules regarding interviews and discussions;
    - the amendments overturned significant case law which had determined for a variety of reasons, a lunch room is not an appropriate venue for holding discussions or conducting interviews; and
    - the amendments violated non-union members right to privacy and also rendered irrelevant employees' right to not participate in discussions (i.e. to enjoy their lunch breaks without being harassed by permit holders); and
- with respect to accommodation/transport arrangements:
    - there was no cogent evidence provided to suggest that such changes were necessary;
    - the amendments overlooked or ignored the fact that in today's world there are multiple ways in which permit holders could hold discussions with their members without having to actually physically attend sites; and
    - the amendments required occupiers to incur considerable costs, and waste valuable time and resources in the FWC if they declined entry under these arrangements.

The Productivity Commission recently referred to examples provided by employers during its inquiry into the workplace relations inquiry that suggest a failing of the provisions, including:

[35] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p.p. 908-909.

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> *AMMA argued that 'a substantial amount of case law has been devoted to interpreting the meaning of the lunch room access provisions since they were introduced' (sub. 96, p. 223). In some instances, this has led to disputes where union officials have allegedly insisted on holding discussions in disruptive, unsafe or costly locations, including crib rooms that were inside the cabin of a dragline excavator (BHP Billiton, sub. 168; Minerals Council of Australia, sub. 129), or in a restricted area where explosives were stored (AMMA, trans. p. 765).*
> *This demonstrates the failing that often accompanies the use of black letter law in circumstances that are by their nature undefinable.*
>
> *Aside from operational concerns, the effect on employees themselves should be considered. It has been suggested by some inquiry participants that some workers have felt inconvenienced or intimidated by the presence of union officials in meal rooms during their breaks (Mitolo Group, sub. 213; BHP, sub. 122; Rio Tinto, sub. 122; AMMA, sub. 96, sub. DR322; and CCIWA, sub. DR323).*[36]

Key changes proposed in Schedule 1, Part 5 of the Bill that will take steps to address these concerns include:

- the repeal of section 484 of the FW Act and its substitution with a new section 484 which would introduce new criteria that a permit holder's organisation must satisfy in order to exercise entry for discussion purposes including:
    - in circumstances where an enterprise agreement applies to work performed at the premises, a requirement that the permit holder's organisation is covered by the enterprise agreement;
    - in circumstances where a permit holder's organisation is not covered by an enterprise agreement or where no enterprise agreement applied to work on the premises, a requirement that a member or prospective member of the permit holder's organisation (who performs work on the premises and whose industrial interests the organisation is entitled to represent) has invited the organisation to send a representative to the premises for the purposes of holding those discussions;[37]
- the repeal of sections 492 and 492A of the FW Act and its replacement with a new section 492 which:
    - requires a permit holder to comply with any reasonable request by the occupier of premises to conduct interviews or hold discussions in a particular room or area of the premises take a particular route to reach a particular room or area of the premises,
    - clarifies (without limitation) that a request is unreasonable if:
        - the room or area is not fit for the purpose of conducting the interviews or holding the discussions; or
        - the request is made with the intention of:

[36] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p.p. 913.
[37] See Schedule 1, Part 5, Item 25 of the Bill.

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- intimidating persons who might participate in the interviews or discussions; or
- discouraging persons from participating in the interviews or discussions; or
- 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;[38]

  - clarifies that a request is not unreasonable only because the room, area or route is not that which the permit holder would have chosen;[39]

- the repeal of subsection 505A(4) which currently provides that the FWC may only make orders to deal with a dispute about frequency of entry is it is satisfied that the frequency of entry would require an unreasonable diversion of the occupier's critical resources. The existing provision sets, in the Australian Chamber's submission, an unreasonably high threshold;[40]
- the repeal of subsection 505A(6) and its replacement with a new subsection 505A(6) which enables the FWC to take into account additional criteria when dealing with disputes regarding frequency of entry including the combined impact on the employer's and occupier's operations of entries onto the premises by permit holders;[41]

The Productivity Commission has described these amendments as 'broadly sound'[42] and has made the following recommendation in its final report which is broadly similar to the amendments proposed in the Bill:

> *RECOMMENDATION 28.1*
>
> *The Australian Government should amend s. 505A of the Fair Work Act 2009 (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:*
>
> - *repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources*
> - *require the Fair Work Commission to take into account:*
>   - *the combined impact on an employer's operations of entries onto the premises*
>   - *the likely benefit to employees of further entries onto the premises*
>   - *the employee representative's reason(s) for the frequency of entries.*

Schedule 1, Part 5, Item 31 of the Bill also proposes the introduction of a new subsection 520A which provides that, upon application by an by an organisation, the FWC must issue an invitation certificate if satisfied that a member, or prospective member, of the organisation whom the permit

[38] See Schedule 1, Part 5, Item 26 of the Bill.
[39] See Schedule 1, Part 5, Item 26 of the Bill.
[40] See Schedule 1, Part 5, Item 29 of the Bill.
[41] See Schedule 1, Part 5, Item 30 of the Bill.
[42] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 909.

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holder's organisations is entitled to represent, performs work on the premises and has invite the organisation to send a representative to the premises for the purposes of holding discussions.

The changes proposed within the Bill are modest and restore some much needed balance with respect to union entry privileges. However the Australian Chamber considers that further changes are needed to strike the appropriate balance and we maintain our primary position that provisions providing for union entry should be amended so that they reflect the pre-FW Act rules and restrictions.

By way of final observation and for contextual purposes, whereas the FW Act also introduced the capacity to include clauses in enterprise agreements that confer additional access privileges beyond legislated rights, the Australian Chamber maintains that union entry entitlements should be limited to rights contained within statute.

Recommendation 4: The Australian Chamber supports the measures contained with Schedule 1, Part 5 of the Bill which takes steps to restore much needed balance to union entry privileges.

The Australian Chamber also recommends that the Committee consider recommending that entry under section 484 of the FW Act should, in all circumstances, require a request from an eligible employee.

Notwithstanding its general support for the amendments, the Australian Chamber maintains its position that further reform of union entry provisions is required to restore the balance that existed prior to the commencement of the Fair Work Act 2009 (Cth). The Australian Chamber also maintains its position that union entry entitlements should be limited to rights contained within statute.

6 Fair Work Commission hearings and conferences

Part 6 of Schedule 1 of the Bill proposes amendments that provide that, subject to certain conditions the FWC is not required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application under:

- section 399A of the FW Act which enables the FWC to dismiss an unfair dismissal application where the applicant has unreasonably failed to attend a conference or hearing, comply with an order or direction, or discontinue an application after a matter has settled; or
- section 587 of the FW Act which provides the FWC with a general power to dismiss applications, including those that are frivolous or vexatious or have no reasonable prospects of success.

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Schedule 1, Part 6, Item 40 proposes the inclusion of a new section 399B as follows:

> ***399B Hearings and conferences – dismissing applications***
>
> *(1) If the FWC decides not to hold a hearing, or conduct a conference, for the purposes of deciding whether to exercise a designated application-dismissal power, the FWC must, before deciding whether to exercise the power:*
>
> *a. invite the parties to the matter concerned to provide further information that relates to whether the power should be exercised; and*
>
> *b. take account of any such information.*
>
> *(2) If, as a result of information provided as mentioned in subsection (1), the FWC considers that it would be desirable to hold a hearing, or conduct a conference, for the purposes of deciding whether to exercise a designated application-dismissal power, the FWC may do so.*
>
> *(3) An invitation under paragraph (1)(a) must:*
>
> *a. be given by written notice to the parties to the matter concerned; and*
>
> *b. specify the time by which the information referred to in the invitation is to be provided.*

These amendments seek to implement the following Review Panel recommendation:

> ***Recommendation 43:*** *The Panel recommends that the FW Act be amended to provide that FWA is not required to hold a hearing when exercising powers to dismiss an application under s. 587, nor when exercising the recommended powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWA direction or order. In each of those circumstances, FWA must be required to invite the applicant and the employer to provide further information before making a decision to dismiss the application or not.*[43]

In arriving at this recommendation the Review Panel acknowledged the problem of 'go away' money, noting:

> *It is not surprising that this might become a feature (though to what extent is another question) of a legal process in which one party can seek a remedy against another party using processes that are comparatively informal, inexpensive and where the grant of a*

[43] Productivity Commission 2011, *"Economic Structure and Performance of the Australian Retail Industry"*, Report no. 56 Canberra, p. 229.

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> *remedy is likely to depend upon a subjective evaluation of criteria which are fairly broadly expressed. We accept that it is undesirable that payments of this character are made.*[44]

In the Productivity Commission's recent inquiry into the workplace relations framework the Australian Chamber dealt extensively with the costs that employers incur when defending unfair dismissal claims. In particular, research was cited that put the cost of defending a claim up to and including conciliation in 2005 figures was approximately $13,000, while a 2012 case study estimated the cost in the vicinity of $15,000-$20,000.[45] For SMEs, these sums are not insignificant.

The option to conduct an assessment of the merits 'on the papers' will be appropriate for cases where the material filed by the parties is relatively clear and developed. Even if such an assessment does not stimulate the resolution of the dispute, the respective parties will at least be more focussed going into a subsequent conciliation conference.

As the Australian Chamber canvassed in its submission to the Productivity Commission, it is the desire to avoid further cost, stress, time and inconvenience that puts employers in the frame of mind where they settle and the merit of the respective positions of the parties is pushed to the side.[46] If there is to be any improvement in the level of confidence stakeholders have in the unfair dismissal laws, the process has to leave both parties more satisfied that the merits of their position (or lack thereof) have materially influenced the outcome.

The Australian Chamber has advocated for 'preliminary screening processes' that would enable the FWC to dismiss an application based on an assessment 'on the papers', without a hearing or conducting a conciliation conference. As there has been a substantial increase in the number of unfair dismissal claims since the passage of the FW Act, more robust screening processes will help to filter unmeritorious claims early in the process.

In its final report arising from its inquiry into the workplace relations framework, the Productivity Commission also made the following recommendation which is broadly consistent with the Review Panel recommendation and the amendments proposed in Schedule 1, Part 6 of the Bill:

> *RECOMMENDATION 17.2*
>
> *The Australian Government should amend the Fair Work Act 2009 (Cth) to give the Fair Work Commission clearer powers, in limited circumstances, to deal with unfair dismissal applications before conducting a conference or hearing, and based on forms provided by applicants and respondents (that is, 'on the papers').*[47]

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[44] McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012, p. 222.
[45] Australian Chamber of Commerce and Industry, Initial Submission to the Productivity Commission's inquiry into the workplace relation's framework, March 2015, p.118.
[46] Australian Chamber of Commerce and Industry, Initial Submission to the Productivity Commission's inquiry into the workplace relation's framework, March 2015, p. 120.
[47] Productivity Commission 2015, *Workplace Relations Framework, Final Report*, Canberra, p. 594.

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Recommendation 5 The Australian Chamber supports the amendments set out in Schedule 1, Part 6 of the Bill, maintaining the view that the proposed amendments would improve the efficiency of unfair dismissal matters by allowing for applications to be dealt with on the papers and would in-turn reduce the costs incurred by relevant parties.

7 Individual flexibility arrangements

The FW Act requires modern awards and enterprise agreements to contain a flexibility term enabling an employee and his or her employer to agree to an 'individual flexibility arrangement' that would have the effect of varying certain terms of the applicable modern award or enterprise agreement as they apply to that particular employee. Such terms arise from the previous Government's commitment that "each and every award will contain a flexibility clause that enables arrangements to meet the genuine individual needs of employers and employees".[48] However low utilisation of individual flexibility arrangements suggests they cannot effectively do so. A Fair Work Australia survey in 2011 indicated that only six percent of surveyed employers responded that they had used an individual flexibility arrangement. The Productivity Commission has also suggested that the use of individual flexibility arrangements has been quite limited (at around 2 per cent of employees).[49]

Individual flexibility arrangements are encumbered by a number of limitations including but not limited to:

- the inability to make individual flexibility arrangements a condition of employment;
- the ability to unilaterally terminate an individual flexibility arrangement with notice;
- limitations on the scope of terms and conditions that can be individually negotiated.

The Australian Chamber maintains the view that it is neither desirable nor practical to require an employer, particularly a small business employer, to continually navigate multiple, complex regulatory instruments in giving effect to employee entitlements. Individual agreement making underpinned by an appropriate minimum safety net would help to overcome this complexity.

The amendments proposed within the Bill do not address all of the concerns and limitations identified above. Notwithstanding this, the independent Review Panel recommended changes to encourage and make it easier for employers and employees to enter into IFAs, as set out in recommendations 9, 12, and 24 of its report, and the Bill's response to these recommendations would seem relatively uncontroversial given that individual flexibility arrangements would remain encumbered by the following conditions and limitations, even if the amendments were passed:

- the employee and employer are required to genuinely agree to the arrangement;

[48] "Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces", April 2007.
[49] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 723.

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- the arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to;
- the individual flexibility agreement must be in writing and signed by the employer and employee (of employee's parent or guardian if they are under 18 years of age);
- a copy of the individual flexibility arrangement must be given to the employee.

Flexibility terms in industrial instruments are also required to:

- identify the terms of the instrument which may be varied by an individual flexibility arrangement; and
- set out how the arrangement may be terminated (currently by mutual agreement at any time or unilaterally by giving 13 weeks' notice in the case of an award of 28 days' notice in the case of an enterprise agreement).

7.1 Genuine needs statement

The Bill proposes to require the employer to ensure that any individual flexibility arrangement includes a statement by an employee setting out why they believe that the arrangement meets their genuine needs and results in them being better off overall than if no individual flexibility arrangement were entered into. Schedule 1, Part 3, Items 5 and 13 propose to do this by inserting a new section 144(4)(ca) after section 144(4)(c) and by inserting a new subsection 203(4A) after subsection 203(4). These amendments partly implement Review Panel recommendation 9.

The Australian Chamber does not consider this requirement to be necessary as the statutory context of individual flexibility arrangements is designed to meet the genuine needs of the employee and employer. In making an individual flexibility arrangement the employer and employee must genuinely agree to terms which leaves the employee 'better off' when assessed against the relevant instrument. The requirements for making individual flexibility agreements are already highly prescriptive and the proposed requirement for a genuine needs statement would just introduce another layer of complexity which could compound the reservations employers have around entering into these arrangements.

7.2 Termination of individual flexibility arrangements

As recently noted by the Productivity Commission, a key concern held by employers in relation to individual flexibility arrangements is the capacity for an employee to unilaterally terminate the arrangement with 28 days' notice, with the potential to expose the employer to financial and operational risks.[50] The Productivity Commission stated:

> *As a concrete illustration, a business might set up rostering arrangements underpinned by commitments by employees set down in IFAs, only to find that the termination of several IFAs made the arrangements untenable. By reducing their expected return, the risk that*

[50] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 735.

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> *IFAs may be terminated soon after their formation may undermine the incentives for managerial innovations.*[51]

In this regard, the Bill proposes to enable termination of an individual flexibility arrangement by either the employer or employee giving 13 weeks' notice in writing to the other party, or at any time by written agreement. Schedule 1, Part 3, Items 6 of the Bill proposes to do this through the repeal of current section 144(4)(d), which requires the award to set out how any flexibility arrangement may be terminated, substituting it with a new section 144(4)(d) which reads as follows:

> *(d) require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:*
>
> *(i) by either the employee, or the employer, giving 13 weeks notice of termination, in writing, to the other party to the arrangement; or*
>
> *(ii) by the employee and the employer at any time if they agree, in writing, to the termination; and*

Schedule 1, Part 3, Item 14 of the Bill proposes to do this by substituting the text "written notice of not more than 28 days" where appearing in subsection 203(6)(a) with the text "13 weeks notice of termination, in writing to the other party to the arrangement".

For arrangements made pursuant to flexibility terms in enterprise agreements that do not meet the requirements for an individual flexibility arrangement, a consequential amendment is proposed in Schedule 1, Part 3, Item 16 which repeals subsection 204(4) and replaces it with a new provision that will preserves the existing position and enables either party to terminate the arrangement by giving not more than 28 days' notice or at any time by agreement in writing. A further amendment or note may be of benefit to clarify that this is not intended to circumvent the proposed new 13 week notice requirement applying to a party wishing to terminate an individual flexibility arrangement unilaterally but, rather, is intended to capture arrangements made prior to the amendment coming into effect.

Facilitating flexibility pursuant to an individual flexibility arrangement may not only impact the employee who is party to the arrangement but may have broader consequences for others in the workplace and for the operations of the business. Accordingly, the Australian Chamber supports these amendments which largely implement Review Panel recommendation 12. However, the Australian Chamber also encourages the Committee to give consideration to Recommendation 22.1 in the final report of the Productivity Commission arising from its inquiry into the workplace relations framework which states:

> *The Australian Government should amend the Fair Work Act 2009 (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1*

[51] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 735.

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> *year if agreed by the employee and employer. The Act should specify that the default termination notice period should be 13 weeks.*[52]

In making this recommendation, the Productivity Commission noted that Australian Chamber member, Business SA conducted a survey of members which confirmed that the take-up of IFAs is low and that 68 per cent of members who responded would consider using IFAs if the notice period for termination was extended to at least one year.[53]

In making its recommendation and in noting that enabling unilateral termination of an arrangement after one year "appears reasonable"[54] the Productivity Commission stated:

> *On balance, the Productivity Commission considers that one year, while it will not suit all types of businesses, provides additional flexibility for employees and employers to agree to IFAs that suit their business and personal circumstances while retaining the protection of a default where the employer and employee cannot agree on, or do not see the need for, an alternate termination period.*[55]

7.3 Clarification that non-monetary benefits can be taken into account when assessing whether an employee is better off overall

The Productivity Commission has acknowledged concerns that employers have difficulty assessing with certainty whether a particular individual flexibility arrangement meets the better of overall test and the financial risk that this presents.[56] In its draft report arising from its inquiry into the workplace relations framework it noted:

> *A particularly vexing issue — for both enterprise agreements and individual flexibility arrangements — is how to trade off non-monetary benefits against other benefits of an award.*[57]

Employers may be discouraged from using an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit due to the perceived risk that they may be breaching the award terms should a court conclude that the individual flexibility arrangement does not meet the better off over all test when assessed against award conditions. This is unsatisfactory, particularly given the FW Act's Explanatory Memorandum expressly contemplated that non-monetary benefits can be taken into account when assessing where an employee is better off overall under the arrangement.

The Review Panel made the following recommendation:

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[52] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 737.
[53] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 737.
[54] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 737.
[55] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 737.
[56] See Productivity Commission 2011, *"Economic Structure and Performance of the Australian Retail Industry",* Report no. 56, Canberra, p. 351.
[57] Productivity Commission 2015, *Workplace Relations Framework*, *Draft Report,* Canberra, p. 32.

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> ***Recommendation 9****: The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.*

Notwithstanding that non-monetary benefits were always intended to be capable of consideration when determining whether a person is better off overall under an individual flexibility arrangement, a number of practical problems arise from this recommendation in its pure form and the Australian Chamber prefers the clear and simple text proposed within the Bill. The assessment of whether a monetary benefit foregone is 'relatively significant' and whether the value of a non-monetary benefit is 'proportionate' is a highly subjective one.

Schedule 1, Part 3, Items 7 and 12 of the Bill propose to address these concerns by adding the following note at the end of subsections 144(4) and 203(4) respectively:

> *Note: Benefits other than an entitlement to a payment of money may be taken into account for the purposes of paragraph (c).*
>
> *Note: Benefits other than an entitlement to a payment of money may be taken into account for the purposes of this subsection.*

The Australian Chamber supports these amendments as they represent a step in the right direction in terms of addressing practical concerns arising in relation to individual flexibility arrangements. However more broadly, serious consideration should be given to the Productivity Commission's Recommendation 22.2 in its final report arising from its inquiry into the workplace relations framework, which suggests that the Australian Government amend the Fair Work Act 2009 (Cth) to introduce a new no-disadvantage test to replace the better off overall test for the assessment of individual flexibility arrangements.[58]

As noted in its response to the Productivity Commission's Draft Report, the Australian Chamber supports the principle of reintroducing a global no-disadvantage test. The manner of its application would be of critical importance. Caution needs to be exercised to ensure that guidelines regarding its application do not create another layer of complexity and bureaucracy that undermines the intention of agreement making to secure more flexible arrangements relative to the award against which they are assessed. The WR Act's 'global' no-disadvantage test from 1996-2006, which provided that an AWA or certified agreement would pass this test if its approval would not result, on balance, in a reduction of the overall terms and conditions of employment under the relevant award and state and federal laws provides a useful benchmark for the design of such as test.

[58] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra. p. 743.

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7.4 Greater certainty of compliance

The attractiveness of individual flexibility arrangements may be enhanced by reducing the risks associated with their implementation. The Productivity Commission has called out some of the factors that heighten the risk factors for employers, including the realty that:

> *the better off overall test (BOOT) is not simple to apply and consequently reduces the possibility of effective beneficial tradeoffs. In turn, this may expose employers to compliance risks.*[59]

Schedule 1, Part 3, Items 9 and 17 of the Bill proposes the following new provisions respectively:

> ***145AA Contravention of flexibility term by employer***
>
> *An employer does not contravene a flexibility term of a modern award in relation to a particular individual flexibility arrangement of, at the time when the arrangement is made, the employer reasonably believes that the requirements of the term were complied with, so far as the requirements are applicable to the arrangement.*

and

> ***204A Contravention of flexibility term by employer***
>
> *An employer does not contravene a flexibility term of an enterprise agreement in relation to a particular individual flexibility arrangement of, at the time when the arrangement is made, the employer reasonably believes that the requirements of the term were complied with, so far as the requirements are applicable to the arrangement.*

Schedule 1, Part 3, Items 8 and 15 of the Bill also propose to add the following notes at the end of subsections 145(3) and 204(3) respectively:

> *Note: An employer does not contravene a flexibility term in the circumstances set out in section 145AA.*

and

> *Note: An employer does not contravene a flexibility term in the circumstances set out in section 204A.*

The Australian Chamber supports these amendments as a proposed defence to an alleged contravention may provide employers with greater confidence in entering into the arrangements by providing enhanced certainty of compliance.

7.5 Addressing agreement terms that seek to limit individual flexibility arrangements

Schedule 1, Part 3, Item 10 of the Bill proposes the following new provision to be inserted before paragraph 203(2)(a):

[59] Productivity Commission 2015, *Workplace Relations Framework*, *Final Report,* Canberra, p. 723

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> *(aa) if the enterprise agreement includes terms that deal with one or more of the following matters:*
> *(i) arrangements about when work is performed;*
> *(ii) overtime rates;*
> *(iii) penalty rates;*
> *(iv) allowances;*
> *(v) leave loading;*
> *provide that the effect of those terms may be varied by an individual flexibility arrangement agreed to under the flexibility term; and*

Schedule 1, Part 3, Item 11 of the Bill proposes a consequential amendment to subsection 203(2)(a) of the FW Act, substituting the text "the terms" with "any other terms".

The Australian Chamber supports these amendments which will address disputation arising regarding the content of individual flexibility arrangements and overcome the practice of unions attempting to limit their scope.

As stated above, the Australian Chamber supports these amendments because they represent a step in the right direction in terms of addressing practical concerns arising in relation to individual flexibility arrangements. Consistent with the other amendments in the Bill, they are modest and reasonable. Ultimately however, they fall short of the Australian Chamber's preferred outcome of individual statutory agreements capable of operating for the same duration and subject to the same safety net as collective agreements, providing individual employers and employees with the certainty of a single reference point regarding terms and conditions of employment that can truly reflect their individual circumstances.

Recommendation 6: The Australian Chamber supports the amendments proposed in Schedule 1, Part 3 of the Bill, maintaining the view that the proposed amendments will resolve ongoing disputation about the content of and overcome the practice of unions trying to limit the scope of individual flexibility arrangements.

Proposing a defence to an alleged contravention in circumstances where the employer reasonably believes that the requirements of an individual flexibility term have been complied with and extending the notice period may also make individual flexibility agreements a more attractive option however the Australian Chamber maintains its position that broader reform of the framework is required to enable individual statutory agreements to be made on more flexible terms.

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8 About the Australian Chamber

8.1 Who we are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

8.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber of Commerce and Industry

ACCI Members

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