AFEI Submission

Fair Work Amendment (Remaining 2014 Measures) Bill 2015

Senate Education and Employment Legislation Committee Inquiry

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

2. AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. Our membership extends across employers of all sizes and a wide diversity of industries.

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

Part 1: Payment for annual leave

4. 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. Annual leave loading will not be payable on termination of employment unless an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.

5. AFEI strongly supports the proposed amendment to the *Fair Work Act 2009* (**the Act**) to make clear that payment of annual leave loading on termination is dictated by the terms of a relevant industrial instrument. It is wholly appropriate to make clear that the annual leave loading, an amount typically paid on leave taken during employment to compensate for opportunities that could never accrue post termination, should only be payable where the relevant instrument so provides. Silence on the subject or an explicit reference to such a payment not being payable should result in no payment of leave loading.

Part 2: Taking or accruing leave while receiving workers' compensation

6. AFEI strongly supports the proposed amendment to the Act concerning leave accrual during periods when an employee is receiving workers compensation.

7. Specifically, s.130 of the Act provides that an employee is not entitled to take or accrue any leave entitlements provided by the NES (such as annual or personal leave) while an employee is receiving workers compensation payments. However, s.130(2) undermines this provision because the Act does not "*prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law*".

8. This provision requires employers to apply the frequently confusing and uncertain provisions of state based workers compensation law, which may be different in many areas where they conduct business. The provision is also problematic because it refers to leave arising "under this Part". This leaves open the question of leave taken and accrued under other instruments.

9. The Act should be amended to enable the current NES provision to be applied consistently without allowing state legislation to provide alternative state based standards, and enabling different entitlements to accrue and take leave depending on those standards.

Part 3: Individual Flexibility Arrangements

10. AFEI maintains its previously expressed view that Individual Flexibility Arrangements (**IFAs**) cannot be described as achieving their objective of enhancing workplace flexibility and productivity. The IFA provisions in the Act were drafted with the intention of constraining their use and to ensure they could be readily challenged. As a consequence, the use of IFAs is minimal.

11. The proposed amendments give some recognition to these restrictions, but, if our workplace regulation system was balanced and reasonable, it would enable, not constrain, flexibility in workplaces and there would be no need for these cumbersome so called flexibility provisions. The NES, awards, and the Act create a complex and multi layered system that presents a monolithic obstacle to flexibility – even if the use of IFAs was widely sought.

12. The term 'flexibility' implies flexibility for the employer when, in practice, it is concerned with giving employees greater choice in hours worked, time off and other work arrangements which can be disruptive or introduce friction in the efficient running of the business. Further, the current regulatory framework minimum terms and conditions are set so high that there is little capacity to depart from them in a way that would make commercial sense.

Genuine needs statement

13. A "genuine needs statement" is an attempt to provide a record as to the intent of the parties and to an assessment of compliance. However, how this will work in practice is highly uncertain. It is more a reflection of the regulator's (and politicians' view) that high levels of regulatory intervention are required in the minute details of running a workplace, that the parties are incapable of agreeing fair and compliant arrangements themselves, than a "safeguard" as to intent and compliance.

14. Either the arrangements comply with the legislation or they do not. If anything, all that should be required is a statement that the arrangement has been agreed and meets the employee's genuine needs. The proposed amendment carries a clear potential for more administrative complexity, questions of privacy, discrimination, literacy levels and so on which arise from the legislative need for an employee statement setting out why the arrangement meets their genuine needs and that they are better off overall. We doubt that alone they would provide a useful defence for employers if the arrangement was challenged, which is why the introduction of an explicit defence for employers to an alleged breach where they believe all requirements have been met is welcomed (see below).

Termination of IFAs

15. AFEI supports the proposed amendment to provide that modern award and enterprise agreement flexibility terms require 13 weeks' unilateral written notice of termination.

16. It is unacceptable for employers prepared to bargain to be limited to a 28 day termination period when their corresponding modern award allows for termination on 13 weeks' notice.

Clarification of non-monetary benefits for the purposes of the BOOT

17. AFEI supports the proposed amendments to make explicit that non-monetary entitlements can be considered when determining if an IFA agreed to under a modern award or an enterprise agreement meets the Better Off Overall Test (BOOT).

18. It has been an issue of contention amongst employers whether they could grant employee requests for flexibility if the proposal would increase the cost of labour for the employee and the employer was only prepared to allow the flexibility on a cost neutral basis. This amendment will provide some clarity around this capacity. However, many issues will remain surrounding "relatively insignificant" (as expressed in the Explanatory Memorandum), matters of personal judgement and regulator interpretation. Again the amendments demonstrate the difficulties of attempting to meld flexibility provisions into an inflexible legislative scheme, and raises the question of flexibility for whom?

19. As the Explanatory Memorandum states, as the Act already permits benefits that are not monetary and to avoid casting doubt on this by altering the current provisions, this is to be implemented by a legislative note rather than a substantive provision. It does not alter the legislation.

Defence to alleged contravention

20. The proposed amendments provide that an employer does not contravene a modern award or enterprise agreement flexibility term in relation to an IFA if at the time when the arrangement is made, the employer reasonably believes that the requirements of the term were complied with and are supported.

21. As the Explanatory Memorandum states the genuine needs statement required to be included in an individual flexibility arrangement would be available as evidence of the employee's state of mind at the time that the individual flexibility arrangement was agreed to and 'may be relevant' to assessing the reasonableness of the employer's belief that it had complied with those requirements. The clear possibility of the regulator holding a different view to that expressed in the genuine needs statement and the employer's view remains.

IFA provisions in enterprise agreements

22. AFEI supports the amendments concerning the content and scope of IFA provisions in an enterprise agreement. It is our preference that all terms in a modern award or enterprise agreement be capable of variation to meet the genuine individual needs of employers and employees.

23. Absent this provision, it is appropriate that the Act set out the minimum issues that may be dealt with via an IFA whilst allowing scope for further items to be agreed. Unions view IFAs as a vehicle used by employers to alter supposedly sacrosanct minimum conditions including penalty rates, public holiday pay, and annual leave and have worked to prevent their widespread or meaningful use. The terms of an IFA must be decided when the enterprise agreement is being negotiated. Consequently, unions have been able to restrict the scope and application of IFAs as part of enterprise bargaining.

24. Without such a clause unions are able to whittle away any utility such a provision has by limiting the scope of the matters subject to its terms.

Part 4: Transfer of business

25. The proposed amendments, while supported, are very limited in scope in addressing only the circumstances where an employee has voluntarily transferred between associated entities. Employees who voluntarily transfer ought to be subject to the terms and conditions of employment provided by the new employer without the need to apply to the Fair Work Commission to stop an employee's industrial instrument transferring. The proposed amendment addresses this restriction, however, this will apply only to a limited number of employees, those employed by associated entities.

26. This is but one aspect of the complex and unfair transfer of business restraints imposed by the Act. The current transfer of business provisions of the Act impose restrictive and unproductive conditions on Australian businesses, reduce job opportunities for workers and further significant reform is required in this area.

27. Currently, there is no viable way to avoid the transfer of an instrument when a transfer of business occurs. It is our experience that, for many businesses, the only realistic option is, therefore, not to employ the potential transferring employees or to withhold offers of employment.

28. Not only does the above reality mean negotiations for sale of businesses can be hindered by issues concerning the re-employment of staff and the consequences of the transfer of an unproductive agreement on the sale price – it is fundamentally bad for employment. Our workplace relations framework should not operate in this way.

Part 5: Right of Entry

Entry for discussion purposes

29. The proposed amendments remove certain of the unbalanced and unnecessary provisions introduced by the previous government in the *Fair Work Amendment Act 2013*. These provisions expanded the right of union access by enabling unions with no members on site to enter workplaces where the union is merely eligible to represent the industrial interests of an employee. Unions have no obligation to identify members or that the member is eligible to be a member of that union. Consequently, employers have experienced an increase in unnecessary disruption and excessive workplace visits.

30. The proposed amendments restrict a union's ability to enter a workplace, to the union's recognised representative role at the workplace in an enterprise agreement or where the employees the union is entitled to represent at the workplace have invited the union's presence. This is supported as being more balanced and reasonable than the current provisions.

Conduct of interviews in a particular room

31. Following the 2013 amendments by the previous government s.492 of the Act currently provides that where a permit holder and an occupier cannot agree on the room or area of the premises, the interview or discussion is to be held in the room/area provided for the purpose of taking meals or other breaks.

32. The effect of this is that any employee on a break in the area chosen by the union official, including those who do not wish to participate, are exposed to union activities and recruitment campaigns. This is expressly contrary to the view enunciated by the Full Bench of the Fair Work Commission in Sommerville Retail Services Pty Ltd v Australasian Meat Industry Employees' Union to ensure that the privacy of individuals eating their lunch was not disturbed.[1]

33. Instead of enhancing the individual's right to privacy (as required by Australia's obligations under the International Covenant on Civil and Political Rights) the intention in the 2013 amendments was to assist unions' in bolstering their dwindling private sector membership levels.

34. The amendment will restore the provisions prior to the *Fair Work Amendment Bill 2013* whereby union officials must comply with a reasonable request by the employer to hold discussions in a particular room and take a particular route to reach that room.

1 [2011] FWAFB 120. See also *Australasian Meat Industry Employees' Union v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847; *Transport Workers' Union of Australia - New South Wales Branch v DHL Supply Chain (Australia) Pty Limited* [2011] FWAFB 3376.

Accommodation and travel arrangements

35. It is appropriate that the accommodation and travel arrangements for permit holders in remote areas, introduced by the previous Federal government on the eve of an election, are repealed. This was an unwarranted cost impost on employers and a benefit for unions which further contribute to the unbalanced nature of the Act.

Frequency of entry dispute settlement powers

36. The imbalance in the Act's right of entry provisions was further exacerbated by the 2013 amendments which provided that the Fair Work Commission may only make an order if it is satisfied that the frequency of entry requires an unreasonable diversion of the occupier's "critical resources". The deliberate insertion of the term "critical resources" rendered the provision useless in affording employers with any redress.

37. The proposed amendments are intended to assist the Fair Work Commission to properly deal with excessive right-of-entry visits. While the Fair Work Commission has power to deal with disputes about the frequency of union visits, it may only issue such an order if it is satisfied that the frequency of visits is such as to require an *'unreasonable diversion of the occupier's critical resources'*. The amendments remove this requirement and will also require the Fair Work Commission to also take into account the combined impact of visits by permit holders on the operations of the employer.

38. AFEI supports the proposed amendments.