Australian Government
Department of Employment

Senate Standing Committee on Education and Employment

Inquiry into the Fair Work Amendment Bill 2014

Submission of the

Department of Employment

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Introduction

1.1 The Department of Employment welcomes the opportunity to make a written submission to the Senate Standing Committee on Education and Employment inquiry into the Fair Work Amendment Bill 2014 (the Bill).

1.2 The *Fair Work Act 2009* (Fair Work Act) and the *Fair Work Regulations 2009* (Fair Work Regulations) provide the legislative framework underpinning the national workplace relations system, which covers the majority of Australian workplaces.

1.3 The *Coalition's Policy to Improve the Fair Work Laws* (the Policy), released in May 2013, includes a commitment to amend the Fair Work Act to build on and improve the existing workplace relations system to provide a stable, fair and prosperous future for all Australians.

1.4 The Policy specifically provides for, amongst other things, improvements to the areas of right of entry, greenfields agreement negotiations, industrial action and individual flexibility arrangements. It also commits to maintaining the value of monies held for underpaid workers and implementing a number of outstanding recommendations of the 2012 post-implementation review of the Fair Work Act (Fair Work Act Review 2012).

1.5 As noted by the Minister for Employment, Senator the Hon Eric Abetz in his Second Reading Speech, this Bill delivers on a number of commitments contained in the Australian Labor Party's 2007 *Forward with Fairness* policy, specifically on right of entry and 'strike first, talk later'.

1.6 The Bill, which gives effect to these pre-election policies, was introduced into the House of Representatives on 27 February 2014, and will amend the Fair Work Act to:

- Provide new criteria for when a union may exercise right of entry for discussion purposes, provide the Fair Work Commission greater powers to deal with right of entry frequency disputes and repeal recent amendments to the right of entry provisions made by the *Fair Work Amendment Act 2013*.
- Extend good faith bargaining to the negotiation of greenfields agreements and provide an optional three month negotiation timeframe for the parties to reach agreement. Where agreement cannot be reached in those circumstances, the employer will be able to take its agreement to the Fair Work Commission for approval. In addition to the existing approval tests, there will be a new requirement in these circumstances to ensure that the agreement is consistent with prevailing industry standards.
- Enhance the operation of individual flexibility arrangements by:
    - confirming that benefits that are not monetary can be taken into account when determining whether an employee is better off overall than the employee would have been if no individual flexibility arrangement were agreed to
    - providing an employer with a defence to alleged contravention of a flexibility term where, at the time an individual flexibility arrangement was made, the employer

reasonably believed that the requirements of the flexibility term were complied with, so far as the requirements were applicable to the arrangement
    - extending the notice period to unilaterally terminate an individual flexibility arrangement made under an enterprise agreement to 13 weeks, and
    - requiring flexibility terms in enterprise agreements to include, as a minimum, that individual flexibility arrangements may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading.
- Maintain the value of monies held for underpaid workers.
- Implement a number of recommendations of the Fair Work Act Review 2012 that were not implemented by the previous government. The changes will provide that:
    - an employee cannot take or accrue leave under the Fair Work Act during a period in which the employee is absent from work and in receipt of workers' compensation
    - a request for extended unpaid parental leave cannot be refused unless the employer has given the employee a reasonable opportunity to discuss the request
    - annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect
    - an application for a protected action ballot can only be made once bargaining for a proposed enterprise agreement has commenced
    - industrial instruments do not transfer in a transfer of business with workers who transfer on their own initiative between employers that are associated entities, and
    - the Fair Work Commission has clearer powers to dismiss unfair dismissal proceedings without a hearing or convening a conference in certain circumstances, such as where an employee fails to attend a proceeding or to comply with an order or direction.

Regulation Impact Statement

1.7 The Department of Employment prepared an Options-stage Regulation Impact Statement covering measures in the Bill deemed to have a regulatory impact. On 12 December 2013 the Office of Best Practice Regulation (OBPR) agreed to the estimated regulatory costs and offsets included in the Options-stage Regulation Impact Statement in accordance with regulatory impact analysis requirements.

1.8 Stakeholders represented on the National Workplace Relations Consultative Council (NWRCC), its subcommittee the Committee on Industrial Legislation, and state and territory government senior officials were consulted on the Options-stage Regulation Impact statement and the draft Bill.

1.9 The Department subsequently prepared a Details-stage Regulation Impact Statement covering measures in the Bill deemed to have a regulatory impact. The OBPR formally approved the Details-stage Regulation Impact Statement, including the agreed regulatory costs and offsets, on 18 February 2014.

1.10 As outlined in the Details-stage Regulation Impact Statement, the estimated red tape reductions and cost savings for Australian business and the economy from measures

included in the Bill is $70,052,747 per year over ten years. The Details-stage Regulation Impact Statement was published with the Explanatory Memorandum to the Bill in accordance with regulatory impact analysis requirements.

Consultation

1.11 Consultation on the Bill was primarily undertaken through four mechanisms.

1.12 A meeting of the Select Council on Workplace Relations, which comprises state and territory ministers with responsibility for workplace relations, was held on 1 November 2013 and chaired by the Minister for Employment. At this meeting the Minister advised members of the range of reforms outlined in the Policy to be implemented and members were invited to provide their input on the reforms. Members noted the Government's commitment to amend the Fair Work Act and to consult the states and territories on the changes.

1.13 A meeting of the NWRCC, which comprises peak bodies representing employers and employees, was held on 25 November 2013 and also chaired by the Minister. At this meeting the Minister advised members of the Government's intention to implement changes to the Fair Work Act outlined in its policy and invited their feedback on the proposed changes.

1.14 At a subsequent NWRCC meeting on 31 January 2014 the Minister provided specific detail on the Policy and sought comment from members. Members also provided feedback on the Options-stage Regulation Impact Statement, which was taken into account in the preparation of the Details-stage Regulation Impact Statement.

1.15 The Committee on Industrial Legislation was consulted on a draft of the Bill during confidential sessions facilitated by the Department of Employment on 4 February 2014. Members provided technical feedback on the draft legislation and amendments were made in a number of areas in response.

1.16 State and territory senior officials with responsibility for workplace relations were consulted and provided feedback on the draft legislation and Options-stage Regulation Impact Statement at a Senior Officials' Meeting on 4 February 2014.

Changes to the operation of the *Fair Work Act 2009*

Section 2: Part 3-4 – Right of entry

Existing framework

2.1 Part 3-4 of the Fair Work Act establishes a right of entry framework under which union officials may enter premises for investigation and discussion purposes. The object of this part of the Act is to create a framework that appropriately balances the rights of organisations to represent their members in the workplace, the right of employees to be represented at work and the right of employers and occupiers of premises to go about their business without undue inconvenience.

Key measures in the Bill

2.2 The Policy includes the commitment to model the right of entry rules on those in place before the Fair Work Act commenced, citing undertakings of the former government that right of entry would stay the same under the Fair Work Act.

2.3 The Bill implements the Government's commitment to restore balance to the right of entry provisions. The amendments include:

- providing new criteria for when a permit holder may enter a workplace for discussion purposes
- expanding the Fair Work Commission's capacity to deal with disputes about the frequency of visits to premises for discussion purposes
- reinstating the rules on location of interviews and discussions in place before the amendments made by the *Fair Work Amendment Act 2013*, and
- repealing amendments made by the *Fair Work Amendment Act 2013* requiring employers to provide transport and accommodation to permit holders seeking to access remote work sites.

2.4 Consistent with the object of Part 3-4 of the Fair Work Act, the amendments are designed to balance the right of unions to have discussions with employees in the workplace with the right of employers to go about their business without unnecessary inconvenience. While employees' rights to industrial representation will be maintained, the changes are expected to reduce the burden facing employers under the current right of entry arrangements.

Right of entry for discussion purposes

2.5 Currently under the Fair Work Act a permit holder has the right to enter a workplace to hold discussions if the union is entitled to represent the industrial interests of the employees at the workplace. This was an expansion of union right of entry access which was in place under the predecessor *Workplace Relations Act 1996*. The *Workplace Relations Act 1996* provided that a union's right of entry was dependent on the union being bound by an award or agreement that covered the relevant workers. The Fair Work

Act changes have led to increased right of entry visits by unions to many workplaces as well as demarcation disputes between unions over coverage of particular workplaces.

2.6 The Bill amends the right of entry provisions to require that permit holders can only enter a workplace for discussion purposes if the permit holder's union is covered by an enterprise agreement or if the union is invited to send a representative to the workplace by an employee. The requirement that the union must be eligible to represent the industrial interests of the employees is retained under the amendments.

2.7 The amendments will mean that the right of entry rules are largely unchanged for unions covered by an enterprise agreement. For unions not covered by a relevant enterprise agreement, it will simply mean that at least one worker must request that the union meet with them in the workplace before a permit holder can enter for discussion purposes.

2.8 The Bill includes the capacity for a union to apply to the Fair Work Commission for an 'invitation certificate' to allow employees to remain anonymous, should they wish, if an employer requests proof of an invitation to the workplace. The Fair Work Commission must issue a certificate if it is satisfied that a worker the union is entitled to represent has invited the union to the workplace to meet with workers. An invitation certificate is not required if the employee is happy to identify themselves to the employer as having invited the union.

Frequency of visits disputes

2.9 Stakeholder submissions to the Fair Work Act Review 2012 indicated that the right of entry provisions of the Fair Work Act increased the frequency of right of entry visits for discussion purposes. This has led to additional costs for some employers due to excessive visits by some unions as well as disputes between unions over eligibility to represent employees. For example, the Fair Work Act Review 2012 noted that during the construction phase of BHP Billiton's Worsley Alumina plant, visits by permit holders increased from zero in 2007 to 676 visits in 2010 alone (page 193). The Australian Industry Group also submitted that 37 per cent of employers it surveyed in August 2011 had experienced more frequent right of entry visits since the Fair Work Act commenced.

2.10 Recognising a growing trend of excessive numbers of union visits to some workplaces, the previous government provided the Fair Work Commission with powers to resolve frequency of visit disputes through changes under the *Fair Work Amendment Act 2013*. Under the provisions, the Fair Work Commission can make any order it considers appropriate to resolve a dispute, including to suspend, revoke or impose conditions on an entry permit. However, the impact of the amendment in addressing excessive visits is minimal as the Commission can only exercise these powers if satisfied that the frequency of visits would require an unreasonable diversion of the employer's 'critical resources'. The majority of employers in the industries most impacted by frequency problems are unlikely to meet this threshold, due to the difficulty of large organisations demonstrating a diversion of their 'critical resources'.

2.11 The Bill provides the Fair Work Commission with capacity to effectively deal with disputes about excessive right of entry visits. It does this by removing the 'critical resources' limitation discussed above, while retaining the orders the Commission can make to resolve a dispute. The changes also require the Commission to take into account the cumulative impact of entries by all union visits to a workplace. The Bill retains the requirement that the Commission must have regard to fairness between the parties to the dispute.

2.12 The proposed right of entry changes ensure that the Fair Work Commission can deal appropriately with excessive visits to workplaces, while balancing the right of unions to hold discussions with members or potential members.

Location of discussions

2.13 Amendments under the *Fair Work Amendment Act 2013* introduced by the previous government have given unions the right to hold discussions with employees in the meal or break room if agreement on another room cannot be reached with the employer. Prior to 1 January 2014, an occupier was required to provide a reasonable room for a union official to use when exercising a right of entry to conduct interviews or hold discussions.

2.14 The amendments were granted an exemption from the requirement for a Regulation Impact Statement, and many stakeholders indicated concern about the impact of the provisions in submissions to the House of Representatives Standing Committee on Education and Employment inquiry into the Fair Work Amendment Bill 2013. In particular, it was argued that the change would prevent employees from enjoying their breaks without disruption, noting that the majority of Australia's workforce are not union members (available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ee/fairwork13/subs.htm).

2.15 The Bill restores the arrangements in place prior to 1 January 2014 which are to provide that a permit holder must comply with any reasonable request by the occupier to hold discussions in a particular room or area of the premises. The Bill sets out a non-exhaustive list of circumstances where a request might be considered unreasonable, including if it is made with the intention of intimidating or discouraging persons from participating in discussions, or if the room is not fit for purpose. The amendments will ensure that workers who wish to speak with a union may do so in an appropriate location while allowing other workers the capacity to avoid such discussions if that is their preference.

Accommodation and transport provisions

2.16 The *Fair Work Amendment Act 2013* introduced by the previous government included further changes to the right of entry provisions to require employers to provide transport and/or accommodation for union officials seeking right of entry to some remote sites. This requirement has been subject to significant stakeholder criticism and was not

recommended by the Fair Work Act Review 2012. It was not subject to analysis via a Regulation Impact Statement.

2.17 In particular, during the Senate Education, Employment and Workplace Relations Legislation Committee inquiry into the Fair Work Amendment Bill 2013, stakeholders indicated that a range of ancillary costs incurred by an employer in organising transport and accommodation for union officials would not be recoverable from unions (submissions available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2010-13/fairwork2013/submissions).

2.18 Consistent with the Policy, the Bill addresses concerns by repealing the provisions relating to transport and accommodation arrangements implemented by the *Fair Work Amendment Act 2013*. The amendments will mean that employers and unions will be free to negotiate transport and accommodation arrangements as they did previously.

2.19 This amendment will reduce the unnecessary cost, disruption and regulation facing affected employers. In submissions to the Senate Education, Employment and Workplace Relations Legislation Committee inquiry into the Fair Work Amendment Bill 2013, stakeholders estimated that this provision could cost upwards of $40,000 for a specially scheduled flight for the union officials.[1]

2.20 The Details-stage Regulation Impact Statement found that repealing the current requirements will save businesses around $382,000 each year over ten years in reduced labour costs alone. Consistent with the other right of entry reforms in the Bill, these changes will further help to balance the right for employees to be represented in the workplace with the right for employers to operate without undue disruption and regulatory burden.

[1] April 2013, Australian Mines and Metals Association (AMMA), Submission to Senate Education, Employment and Workplace Relations Legislation Committee, Inquiry into the Fair Work Amendment Bill 2013, pp. 11-12.

Section 3: Part 2-4 – Greenfields agreements

Existing framework

3.1 Greenfields agreements are a form of enterprise agreement that can be made between an employer or employers and a union or unions to cover a new enterprise. It is a requirement that they must be made in advance of the employment of workers for a new enterprise. In addition to approval criteria that applies to all enterprise agreements, the Fair Work Commission must be satisfied that the union or unions to be covered by the agreement are entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement and that it is in the public interest to approve the agreement.

3.2 Having a greenfields agreement in place is designed to provide increased certainty of labour costs for new enterprises and precludes the possibility of protected industrial action being taken during the nominal period of the agreement's operation. Greenfields agreements are regularly used in the mining and construction industries, which, according to the Department's workplace agreements database, account for around 70 per cent of agreements in these sectors.

3.3 Unlike other forms of enterprise agreements the good faith bargaining requirements at section 228 of the Fair Work Act do not apply to the negotiation of greenfields agreements and there is no formal capacity for the Fair Work Commission to assist the parties with greenfields agreement bargaining disputes. Further, the Fair Work Act does not provide a timeframe for the negotiation of greenfields agreements, or enterprise agreements generally.

Key measures in the Bill

3.4 The Bill responds to stakeholder concerns raised in submissions to the previous government's Fair Work Act Review 2012. Employers and their representatives, particularly those in the construction and mining industries, are concerned that some unions have exploited their legislated role in making greenfields agreements by seeking, for example, excessive wage and other claims. This has led to delays in the commencement of projects, to significant doubt over whether projects will proceed and sent negative messages to overseas investors when considering investment in Australia.

3.5 Stakeholder concerns are supported by findings of the Fair Work Act Review 2012 which noted that based on the evidence provided *"there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia. This is because the existing provisions effectively confer on a union (or unions) with coverage of a majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way"* (pages 171-172). The Fair Work Act Review 2012 further found that, under the Fair Work Act, wages outcomes between greenfields agreements and other enterprise agreements had widened, that greenfields agreements were less likely to

contain flexible agreement clauses, and greenfields agreements were more likely to contain clauses that resulted in increased costs for employers (pages 170-171).

3.6 The amendments are intended to provide for the more efficient negotiation of single-enterprise greenfields agreements. The Bill will extend the 'bargaining representative' concept to all single-enterprise greenfields agreement negotiations, which will have the automatic effect of extending the existing good faith bargaining requirements at section 228 of the Fair Work Act to employers and unions in these negotiations. This will establish standards of bargaining conduct that will require bargaining representatives to, for example, attend and participate in meetings at reasonable times and consider and respond to each other's proposals in a timely manner.

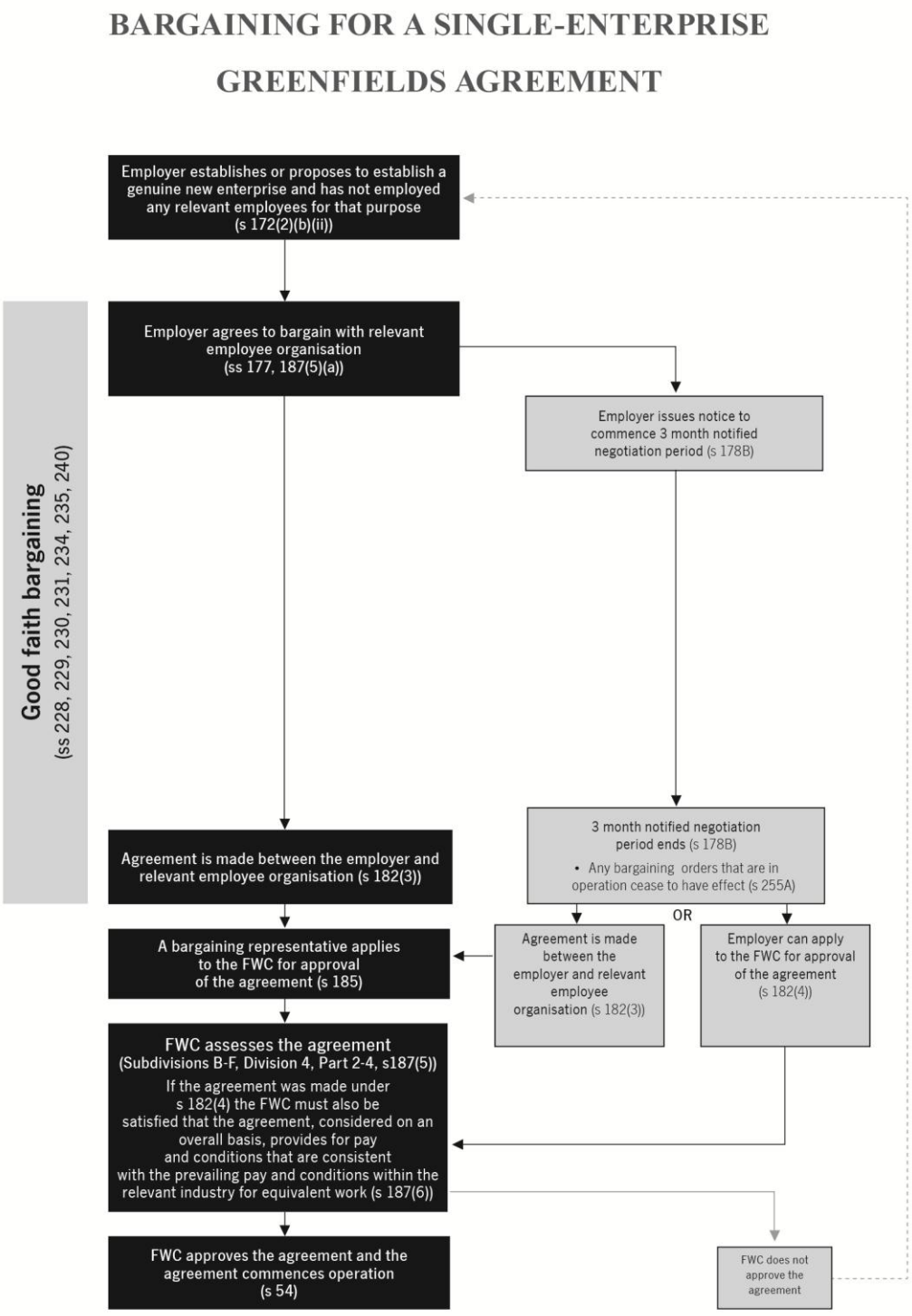
3.7 In the event that a party is not bargaining in good faith, and consistent with other forms of agreement making, bargaining representatives will be able to seek bargaining orders from the Fair Work Commission under section 229 of the Fair Work Act. Contravention of a bargaining order is a civil remedy provision. Similarly, bargaining representatives will be able to seek the assistance of the Fair Work Commission to deal with a bargaining dispute under section 240 of the Fair Work Act.

3.8 The Bill will also establish a new, optional three month timeframe for greenfields agreement negotiations to ensure that single-enterprise greenfields agreements can be made in a timely manner. The three month timeframe will apply once written notice is provided by an employer to the relevant union or unions of the commencement of the notified negotiation period for the agreement. If agreement cannot be reached within the three month notified negotiation period and the employer has given each union bargaining representative a reasonable opportunity to sign the agreement, the employer will be able to take its proposed agreement to the Fair Work Commission for approval.

3.9 Irrespective of whether a single-enterprise greenfields agreement is made under the new optional three month negotiation process, the existing approval criteria for greenfields agreements will be maintained under the Bill. That is, the agreement must meet existing approval requirements including:

- the better off overall test
- that the union or unions to be covered by the agreement are able to represent the industrial interests of a majority of the employees who will be covered by the agreement in relation to work to be performed under the agreement, and
- the public interest test.

3.10 The diagram below provides an overview of the proposed process for the making and approval of single-enterprise agreements that are greenfields agreements. The references to 'employer' and 'employee organisation' include references to the plural where relevant.



3.11 In relation to greenfields agreements that are made under the new three month negotiation process, the Bill provides an additional new requirement that such agreements must provide for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work. In applying this test, a legislative note provides that the Fair Work Commission may have regard to prevailing pay and conditions for the industry in the relevant geographical area.

3.12 Where the Fair Work Commission approves an agreement in these circumstances, it will also be required to note in its decision that the union or unions that were bargaining representatives for the negotiations will be covered by the agreement. This will ensure that employees who will be covered by the agreement will have access to representation in relation to the agreement when they commence employment.

3.13 Consistent with the existing requirements under the Fair Work Act, the Fair Work Commission can approve a greenfields agreement, approve it with undertakings, or decline to approve it if the agreement does not meet some or all approval requirements. In these circumstances, an employer will be able to recommence bargaining for a new proposed greenfields agreement.

3.14 As noted in the Details-stage Regulation Impact Statement for the reforms, the amendments will have a range of benefits including reducing the burden on employers who may otherwise be subject to protracted negotiations for greenfields agreements. Further, the amendments will help to maximise the viability of major projects by ensuring that greenfields agreement negotiations are conducted in good faith, that the negotiations are not unduly delayed and that investment certainty is maintained, while protecting the interests of employees who will be covered by such agreements.

3.15 The Details-stage Regulation Impact Statement estimates that the benefits from the proposed changes to the greenfields agreement making provisions amount to more than $64 million per year over ten years.

Section 4: Part 2-3 and 2-4 – Individual flexibility arrangements

4.1 Under the Fair Work Act, as it stands today, employers and employees are able to achieve flexibility in the workplace through individual flexibility arrangements. Individual flexibility arrangements vary the effect of terms of modern awards or enterprise agreements in order to meet the genuine needs of employers and individual employees, while ensuring that the employee is better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

4.2 Flexible work practices deliver benefits to both employees and employers. Use of individual flexibility arrangements can lead to greater job satisfaction, improve the ability for employees to manage outside-of-work responsibilities and help employers to attract and retain staff. They are also a recognised lever in supporting women back into the workforce after childbirth and assisting to reduce the gender pay gap.

Existing framework

4.3 The Fair Work Act requires modern awards and enterprise agreements to include a 'flexibility term' that enables an employer and an individual employee to agree to an individual flexibility arrangement. If an enterprise agreement does not include a flexibility term, the model flexibility term set out in the Fair Work Regulations is taken to be a term of the agreement. An individual flexibility arrangement must, amongst other things:

- set out the terms of the modern award or enterprise agreement that are to be varied in their effect
- be genuinely agreed to by the employer and the employee
- result in the employee being better off overall than if no individual flexibility arrangement were in place, and
- be signed by both the employer and employee (as well as a parent or guardian of the employee if the employee is under 18 years of age).

4.4 The usual flexibility term in modern awards enables an individual flexibility arrangement made under a modern award to vary the effect of modern award terms about arrangements for when work is performed, overtime and penalty rates, allowances and leave loadings.

4.5 The scope of flexibility terms in enterprise agreements is determined through the bargaining process so the matters about which an individual flexibility arrangement may be made can vary under each enterprise agreement. For instance, an enterprise agreement may stipulate that an individual flexibility arrangement can only be made about one term, e.g. annual leave.

4.6 An individual flexibility arrangement is enforceable as a term of the modern award or enterprise agreement under which it is made.

Key measures in the Bill

4.7 The Bill is intended to improve the operation of individual flexibility arrangements to ensure that employers and employees have genuine access to fair flexibility in the workplace. The measures in the Bill are intended to provide certainty to employers and employees on how the provisions about individual flexibility arrangements are to operate, while retaining all existing protections for employees.

4.8 The Bill responds to outstanding Fair Work Act Review 2012 recommendations 9, 11, 12 and 24 and will:

- confirm that benefits that are not monetary can be taken into account when determining whether an employee is better off overall than the employee would have been if no individual flexibility arrangement were agreed to
- provide an employer with a defence to alleged contravention of a flexibility term where at the time the arrangement was made the employer reasonably believes that the requirements of the flexibility term were complied with, so far as the requirements are applicable to the arrangement
- extend the notice period to unilaterally terminate an individual flexibility arrangement made under an enterprise agreement to 13 weeks, and
- require flexibility terms in enterprise agreements to include, as a minimum, that individual flexibility arrangements may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading.

4.9 In addition, the Bill will introduce a new additional safeguard that individual flexibility arrangements include a 'genuine needs statement' setting out why the employee believes that the arrangement meets his or her genuine needs and leaves them better off overall than they would have been if no individual flexibility arrangement was in place.

4.10 Under the amendments, in addition to the new safeguard, all existing protections relating to an individual flexibility arrangement will be retained, including:

- that an individual flexibility arrangement cannot be made a condition of employment,
- that it must be genuinely agreed to by an individual employee, and
- that the employee must be better off overall than the employee would have been if no individual flexibility arrangement was in place.

Improving the operation of the better off overall requirement

4.11 The Fair Work Act currently permits non-monetary benefits to be taken into account when determining whether an employee is better off overall than the employee would be if no individual flexibility arrangement were agreed to.

4.12 The Bill inserts a legislative note to confirm that non-monetary benefits can be taken into account when determining whether an individual flexibility arrangement leaves an employee better off overall. The legislative note is intended to provide clarity and certainty to employers and employees.

4.13 The amendment maintains the intention of the current legislation when it was introduced in 2008, as detailed in the Explanatory Memorandum to the Fair Work Bill 2008. Below are illustrative examples which were included in that Explanatory Memorandum.

Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.

In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.

Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non- financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;
- Josh genuinely agreed to the arrangement;
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.

Danae is employed full time as a graphic designer at Pax Designs Pty Ltd. The Pax Designs Pty Ltd Enterprise Agreement 2010 enables an individual flexibility arrangement to be made between the employer and its employees in relation to the span of ordinary hours to be worked.

Danae has school aged children that she wishes to pick up from school two days per week. She negotiates an individual flexibility arrangement with her employer that she will work longer hours three days per week, so that she can leave at 3pm on the other two days to pick up her children. Danae will still work the equivalent of full time hours.

Providing employers with a limited defence

4.14 Under the Fair Work Act, a flexibility term will be contravened if an individual flexibility arrangement does not satisfy the legislative requirements.

4.15 The Bill inserts a new provision that an employer does not contravene a flexibility term in relation to a particular individual flexibility arrangement if, at the time when the arrangement was made, the employer reasonably believed that the requirements of the flexibility term were complied with, so far as the requirements were applicable to the arrangement.

4.16 A genuine needs statement (detailed from paragraph 4.26 below) will be available as evidence of the employee's state of mind at the time the individual flexibility arrangement was agreed to and may be relevant to assessing the reasonableness of the employer's belief that he or she had complied with those requirements.

4.17 The defence will not operate in relation to deliberate contravention of the legislative requirements and all applicable remedies and penalties will still be available in these circumstances.

Extending the unilateral termination period

4.18 The Fair Work Act provides that a flexibility term in an enterprise agreement must state that the employer is required to ensure that any individual flexibility arrangement must be able to be terminated by either the employer or employee giving written notice of not more than 28 days, or at any time if they agree in writing to the termination.

4.19 The Fair Work Act Review 2012 noted that the capacity for an employee to unilaterally terminate an individual flexibility arrangement with 28 days' notice was cited by many as a key disincentive to use an individual flexibility arrangement. *Workplace Express* (7 October

2011) reported that the former Minister for Employment and Workplace Relations, Senator the Hon Chris Evans, told the Australian Labour and Employment Relations Association national conference that he'd had feedback that the 28-day notice period was a barrier to parties making such arrangements but that he also wanted to ensure employees weren't exposed to "capricious" changes to their conditions. The Government's amendments address these concerns.

4.20 The Fair Work Act Review 2012 recommended that the period for unilateral termination be extended to 90 days. A Full Bench of the Fair Work Commission in *Modern Awards Review 2012- Award Flexibility* [2013] FWCFB 2170 (15 April 2013) increased the unilateral termination period for individual flexibility arrangements made under modern awards to 13 weeks. The usual flexibility terms in modern awards were varied to give effect to this determination on 4 December 2013.

4.21 The Bill amends the Fair Work Act to increase the required written notice period for unilateral termination of an individual flexibility arrangement made under an enterprise agreement to 13 weeks. This will align the unilateral termination period with that currently provided for in modern awards.

4.22 By extending the unilateral termination period, employees will have greater confidence that their flexible working arrangements will not change suddenly. Employers will similarly have a greater period of time to make any changes that may be necessary to their operations because of a change in work arrangements.

Improving access to the scope of terms in the model flexibility clause

4.23 The Fair Work Act currently allows parties to bargain over the scope of matters included in flexibility terms in enterprise agreements. This can result in flexibility terms that limit individual flexibility arrangements to only one term of an enterprise agreement.

4.24 The Bill amends the Fair Work Act to require the flexibility term in enterprise agreements to include, as a minimum, the matters in the model flexibility term for enterprise agreements set out in the Fair Work Regulations.

4.25 These amendments ensure that while bargaining representatives may continue to bargain about the matters to be included in an enterprise agreement flexibility term, the matters listed in the model flexibility term must be included as a minimum.

Genuine needs statements

4.26 The Bill maintains the existing protections for employees making an individual flexibility arrangement and adds an additional safeguard by requiring the employer to ensure that any individual flexibility arrangement includes a 'genuine needs statement'.

4.27 The genuine needs statement will set out in writing why the employee believes the arrangement meets his or her genuine needs and results in them being better off overall than they would have been if no individual flexibility arrangement were agreed to. Requiring these matters to be put into writing is intended to ensure that both the employer and individual employee consider these requirements before agreeing to an individual flexibility arrangement.

4.28 The genuine needs statement will be in addition to all other protections for employees in relation to individual flexibility arrangements that currently exist under the Fair Work Act.

Section 5: Part 5-1 – Unclaimed money

5.1 The Fair Work Act currently provides that if an employer owes money, such as unpaid wages, to a former employee who cannot be located, they may discharge their obligation by paying the money to the Commonwealth. Once located, the former employee can make a claim for the money to the Fair Work Ombudsman, which has responsibility for administering these payments on behalf of the Commonwealth.

5.2 In some cases, an employee who is owed money is not located for some time and regardless of how long the Commonwealth holds the money, no interest is currently paid to the employee. The Government is concerned that some employees are not receiving the full value of the money that has been held for them by the Commonwealth.

5.3 The Bill will require the Fair Work Ombudsman to pay interest on amounts of $100 or more that have been held by the Commonwealth for more than six months. This requirement will apply to money received by the Commonwealth from employers after the commencement of the new provisions.

5.4 The rate of interest to be paid will be set by the Minister in a legislative instrument. Interest will be calculated with reference to the Consumer Price Index. This is similar to the approach used by the Australian Securities and Investments Commission for unclaimed money in bank accounts.

5.5 These amendments are intended to ensure that employees receive the full value of money recovered and held by the Commonwealth on their behalf.

Section 6: Amendments to implement Fair Work Act Review 2012 recommendations

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

6.1 Under section 130 of the Fair Work Act, employees are not entitled to take or accrue any leave while absent from work and in receipt of workers' compensation, unless it is permitted by the applicable Commonwealth, state or territory workers' compensation legislation. This has led to the inconsistent treatment of employee entitlements across Australia. For instance, employees in the Queensland and Commonwealth systems who are absent from work on workers' compensation can accrue annual, personal and long service leave, while employees in other jurisdictions cannot.

6.2 The Bill addresses existing complexity and confusion for employees and employers due to differing entitlements under workers' compensation legislation. The amendment will provide that an employee cannot take or accrue leave under the Fair Work Act during a period in which the employee is absent from work and in receipt of workers' compensation. This amendment will ensure that these employees have the same entitlements in relation to the accrual and taking of leave while absent from work and in receipt of workers' compensation regardless of the particular compensation law that applies to them.

6.3 The changes will not alter the capacity of an employee to take unpaid parental leave during a compensation period.

Recommendation 3: Meeting to discuss extensions of parental leave

6.4 The National Employment Standards provide employees with a leave entitlement and return-to-work guarantee when taking parental leave. The provisions are intended to maintain the long-term employment relationship between the parent and the workplace, by allowing parents the flexibility to care for their children in important formative years without having to resign from their paid jobs.

6.5 Under section 76 of the Fair Work Act an employee has the right to request an additional 12 months unpaid parental leave after an initial 12 months leave. An employer must provide a written response to such requests within 21 days and can only refuse a request on reasonable business grounds. This requirement will be maintained under the changes.

6.6 The Bill will amend the Fair Work Act so that an employer will be required to provide an employee a reasonable opportunity to discuss a request for an extension of 12 months unpaid parental leave before that leave can be refused. The amendment was recommended by the Fair Work Act Review 2012 in recognition of the experience of some employees having requests refused without due consideration. A meeting will not be required if the employer agrees to the request. The Explanatory Memorandum notes that the discussion does not need to be face to face but can occur by other means, for example via telephone or video conference.

6.7 The Details-stage Regulation Impact Statement estimates the impact of these changes on employers will be minimal. Data from a survey undertaken by the Fair Work Commission in 2012 was that, since 1 January 2010, only 1.5 per cent of employers had received such a request, and of them more than 95 per cent agreed to the request. This means that less than 5 per cent of employers who receive a request for extended unpaid parental leave will be affected by the changes.

Recommendation 6: Annual leave loading on termination

6.8 Subsection 90(2) of the Fair Work Act requires an employee to be paid, in respect of untaken annual leave entitlements when their employment ends, at the rate the employee would have been paid had he or she taken that leave. This provision has been interpreted in some instances as requiring the payment of annual leave loading on termination of employment, even if award or agreement provisions expressly preclude the payment of the loading upon termination. This interpretation has displaced the longstanding practice in place prior to the Fair Work Act that annual leave loading is only payable at the conclusion of an employee's employment where expressly required by the employee's workplace instrument.

6.9 During the course of the Review a number of stakeholders raised concerns that subsection 90(2) has resulted in additional costs for a large number of employers, who had not traditionally been required to pay leave loading on termination. This typically amounts to a loading of 17.5 percent on top of an employee's base rate of pay, depending on the terms of the relevant award or enterprise agreement. As subsection 90(2) does not expressly clarify whether annual leave loading is payable on termination, the Fair Work Act Review 2012 noted that many employer representatives dispute the interpretation of the provision and that it has created confusion for, and disputes between, employees and employers.

6.10 The Bill will implement recommendation 6 of the Fair Work Act Review 2012, restoring the longstanding position that on termination of employment accrued untaken annual leave is paid at the employee's base rate of pay and leave loading is payable if it is provided for by the relevant instrument. Restoring the longstanding position would provide certainty and clarity to employers and employees and avoid disputes that have arisen as a result of differing interpretations of the provision.

6.11 Parties will still be free to argue both for and against the inclusion of such provisions in individual modern awards throughout the Review of Modern Awards being undertaken by the Fair Work Commission.

Recommendation 31: Protected action ballot orders

6.12 Under the Fair Work Act a secret ballot of employees is required before protected industrial action can be taken, amongst other prerequisites. A bargaining representative must first apply for a protected action ballot order for a ballot to be conducted. In granting

an order, the Fair Work Commission must be satisfied that, among other things, the applicant has been, and is, genuinely trying to reach an agreement. There is no requirement however for the employer to have agreed to bargain or for bargaining to have commenced. This means that a bargaining representative may seek a protected action ballot order, and employees can take protected industrial action, before bargaining has commenced. This was confirmed by the decision of the Full Court of the Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

6.13 Employers and employer representatives have expressed concerns about this matter. Concerns include that protected industrial action can be used as a tactic to pressure employers to commence bargaining for a proposed agreement. Many stakeholders argue that this interpretation of the requirements is anomalous given that majority support determinations under section 236 of the Fair Work Act already provide a formal mechanism for employees to compel an employer to bargain.

6.14 The Bill will amend the Fair Work Act to provide that a bargaining representative cannot make an application for a protected action ballot order unless there has been a 'notification time' in relation to a proposed agreement. Existing subsection 173(2) of the Fair Work Act provides that the 'notification time' for a proposed agreement is the time when:

- the employer agrees to bargain, or initiates bargaining for the agreement, or
- a majority support determination in relation to the agreement comes into operation, or
- a scope order in relation to the agreement comes into operation, or
- a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

6.15 The effect of the amendment is that protected industrial action can only be taken if bargaining for a proposed agreement has commenced, consistent with the recommendation of the Fair Work Act Review 2012. A legislative note makes clear that the absence of agreement about scope of a proposed enterprise agreement does not prevent the taking of protected industrial action.

6.16 This amendment is consistent with the then Leader of the Opposition, Mr Kevin Rudd MP's statement on 17 April 2007, in his speech to the National Press Club, that employees 'will not be able to take strike action unless there has been genuine good faith bargaining'.

Recommendation 38: Transfer of business between associated entities

6.17 As a general rule, where an employee transfers between employers that are associated entities, this will result in a transfer of business and the employee's industrial instrument will transfer with them to the new employer with the employee. This situation applies even where the transfer was initiated by the employee themselves. Under the current transfer of business rules in the Fair Work Act, the only way to stop an instrument transferring with an employee (including in these circumstances) is to seek an order to that effect from the Fair Work Commission. The Fair Work Act Review 2012 considered that removing the need

for this process in relation to voluntary transfers between associated entities would reduce unnecessary expense to employers and employees and increase mobility opportunities for employees.

6.18 The Bill seeks to amend section 311 to provide that when an employee transfers to an associated entity of their current employer on their own initiative, their industrial instrument will not transfer with them and they will be subject to the terms and conditions of their new employer. The changes only impact transfers at an employee's own initiative. Additional transfer of business provisions were introduced in December 2012 to cover transfers of business between state public sector employers and national system employers. The Bill amends those provisions in a similar way to the amendments to section 311. Below is an illustrative example of an employee voluntarily transferring under the proposed amendments.

> Anne is employed full time as an engineer with Mega Engines Pty Ltd (Mega). Her employment with Mega is covered by the *Mega Engines Pty Ltd Enterprise Agreement 2011-2014* (Mega Agreement). Super Engines Pty Ltd (Super) and Mega are part of the same corporate group. The companies are associated entities.
>
> Super conducts a recruitment and selection process for a senior engineer position. Super's relevant industrial instrument is the *Super Engines Pty Ltd Enterprise Agreement 2012-2015*. Anne voluntarily applies for the position with Super in order to progress her career as a senior engineer and to work on a larger range of projects in a bigger team. She is offered and accepts the position.
>
> Under the current transfer of business rules, Super, Anne, or a relevant union would be required to apply to the Fair Work Commission for an order that the Mega Agreement not transfer with Anne and apply to her work with Super. However, under the proposed amendments this process will no longer be necessary as the Mega Agreement will not transfer with Anne and she will automatically be subject to Super's terms and conditions of employment as she has decided to move across at her own initiative.

6.19 The Details-stage Regulation Impact Statement calculated that this amendment to the transfer of business provisions will reduce costs for employers by $95,112 per annum. Costs cover administration and labour costs associated with making an application to the Fair Work Commission. They also include the expense involved in maintaining two different payroll systems if the employer does not seek an order from the Fair Work Commission or if the Fair Work Commission declines to make an order to stop the instrument transferring.

Recommendation 43: Fair Work Commission unfair dismissal hearings and conferences

6.20 The Fair Work Commission currently has the power to dismiss unfair dismissal applications 'on the papers' in certain circumstances, that is, without a hearing. This covers situations where an application is vexatious or unmeritorious, an applicant fails to attend a

conference or hearing or fails to comply with a Fair Work Commission order or direction. However, the Commission's power to do so is limited in cases where a matter involves disputed facts. The Fair Work Act Review 2012 found that this limitation has the effect of causing reluctance among Fair Work Commission members to dismiss unfair dismissal matters 'on the papers'.

6.21 The Bill addresses this issue by establishing a 'designated application-dismissal power', which encompasses the powers of the Fair Work Commission to dismiss applications under sections 399A and 587 of the Fair Work Act. The Bill clarifies that the requirement under section 397 to hold a hearing for matters involving disputed facts does not apply when the Fair Work Commission is exercising the designated application-dismissal power.

6.22 The Bill includes procedural safeguards to provide transparency and ensure that both sides are afforded procedural fairness in such circumstances. In particular, the Bill includes the requirement that the Fair Work Commission must invite parties to provide further information and take this into account before making a decision to dismiss an application without a hearing or conference. Having considered this additional information, the Commission may decide to conduct a conference or hearing if it considers it necessary.