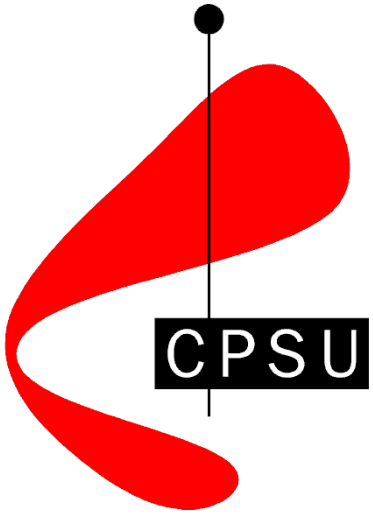

CPSU (PSU Group) Submission

Inquiry into the *Fair Work Amendment Bill 2013*

April 2014

Introduction

The PSU Group of the Community and Public Sector Union (CPSU) is an active and effective union with approximately 55,000 members. The CPSU represents employees in Commonwealth government employment including the Australian Public Service (APS), as well as the ACT Public Service, the NT Public Service, CSIRO, the telecommunications sector, call centres, employment services and broadcasting.

The CPSU welcomes the opportunity to provide a submission to the Senate Standing Committee on Education and Employment Inquiry into the *Fair Work Amendment Bill 2014*.

The *Fair Work Act* is crucial to employees in all areas of our membership – providing legal rights and protections and establishing minimum standards. The CPSU is concerned that a number of the proposals weaken the protections for employees provided by the *Fair Work Act*. The CPSU has provided specific commentary on those matters most relevant to employees in our industries. The CPSU notes the ACTU is making a comprehensive submission to the Inquiry and endorses that submission.

Individual flexibility arrangements

Notice period

The Bill proposes to amend the *Fair Work Act* to extend the notice period for unilateral termination by the employee or the employer of individual flexibility arrangements (IFAs) entered under the terms of enterprise agreements. The amendment would significantly increase the notice period from the current four weeks to 13 weeks.

The CPSU opposes this amendment.

An employee's ability to opt out of an IFA through the provision of four weeks notice is one of the safeguards that was built into the legislative system when IFAs were introduced. By significantly increasing the notice period, the Bill undermines this safeguard.

In workplaces this will mean that it is harder for employees who enter IFAs and then decide this is not in their best interests, to revert to the terms of the applicable enterprise agreement or award.

Defence provision

The Act's current safeguards are further undermined by the inclusion of a defence provision which would protect employers from a finding that they contravened the flexibility term of an enterprise agreement, even where the IFA fails the better off overall test (BOOT). The protection would occur if the employer acted on a reasonable belief that the employee was better off, which seems to largely rely on a statement from the employee.

There is no requirement that the employee be reasonably or accurately informed as to their entitlements before signing such a statement. There is also no requirement that the employer take

appropriate steps to inform itself about the employee's entitlements and ensure that the employee is actually better off overall.

IFAs are already subject to limited scrutiny and oversight. By creating a defence for employers who have been found to have acted contrary to the terms of the enterprise agreement, the Bill will put employees at greater risk of exploitation.

Scope of individual flexibility arrangements

Currently the *Fair Work Act* allows parties to bargaining to negotiate the terms of the IFA clause that will be inserted into the enterprise agreement. This allows parties to consider what individual flexibilities may be appropriate to employees and the enterprise, and craft the individual flexibility clause of the enterprise agreement to suit those purposes.

The Bill proposes amendments to the Act that would require IFA clauses in enterprise agreements to cover a minimum range of matters in flexibility clauses. That is, parties do not have discretion to decide which matters may be subject to future IFAs.

The CPSU opposes these amendments.

By mandating the minimum scope of IFA terms in enterprise agreements, the Bill undermines genuine bargaining processes between employers, employees and unions. The terms of flexibility clauses should properly be a matter for negotiation between bargaining representatives.

The CPSU notes that the Government's drive to mandate the terms of flexibility clauses in enterprise agreements is also reflected in federal public sector industrial relations.

The *Australian Government Public Sector Workplace Bargaining Policy* ("Bargaining Policy") which was recently released by the Government sets out its position as an employer for enterprise bargaining and industrial relations in APS and non-APS agencies.

It is of concern to the CPSU that the Government is seeking to pre-empt the passage of this Bill by mandating these matters in the federal public sector.

During the terms of the Howard Government, many of the worst excesses of the WorkChoices legislation were first tested as Government industrial relations policy in the public sector. It is worrying that the Abbott Government has indicated an intention to undertake a similar approach with federal public sector industrial relations.

Inclusion of non-monetary benefits

In respect of IFAs, the Bill also proposes the inclusion of legislative notes to establish that non-monetary benefits provided for under an IFA may be taken into account for the purposes of the BOOT.

This is of concern to the CPSU.

Under WorkChoices many CPSU members in the federal public sector and other areas, like Telstra, were employed on the basis of individual contracts which removed their rights and entitlements, without significant recompense. At that time for many of those employees, their employment was contingent on accepting such arrangements and being excluded from the operation of the applicable enterprise agreement.

The push for the wider use of IFAs and the inclusion of non-monetary benefits for the purposes of the BOOT does suggest that the Government wants to revert to individual contracts of the WorkChoices era. The Bill's amendments to provide for greater use of these arrangements, whilst at the same time restricting their scrutiny and oversight, are of significant concern to the CPSU.

In addition to these concerns, employees of the federal public sector are worried that they will be the testing ground for the Government's industrial relations agenda, particularly regarding individual contracts.

Right of entry

The Bill seeks to wind back right of entry under the *Fair Work Act*. The CPSU is particularly concerned by three aspects of the amendments:

(a) restrictions on the right to enter for discussions related to the parties bound by the applicable industrial instrument;
(b) restrictions on the use of lunch and tea rooms for discussions; and
(c) frequency disputes.

Restrictions on the right to enter for discussions

In respect of the first matter, the Bill significantly increases the hurdles that have to be met by a union if they are not bound by the instrument applicable in the workplace and wish to exercise their right of entry. These amendments, including the introduction of the invitation certificate, are unnecessary and complicated.

Some employers will use these amendments to unreasonably delay entry by a union. The requirement that a union be invited in by a member or potential member also creates the capacity for implicit and/or explicit intimidation of the workforce.

The amendments have the effect of making it harder for employees to access their union in the workplace, and therefore undermine freedom of association.

There is no clear problem that the amendments are directed at resolving. Indeed the amendments are likely to encourage disputation and challenges by employers, when there is no genuine basis for such a challenge.

For these reasons, the CPSU opposes the amendment.

If the substantive proposal is, however, to proceed there should be a requirement that the employer conduct itself reasonably. At a very minimum, there should be a requirement on an employer to accept the union's right to enter the premises, unless they have a reasonable and genuine basis for believing the union is misleading them. Employers should not be able to unfairly delay employees' access to the union by requiring invitation certificate processes in every situation.

In respect of these changes, the amendments would apply prospectively. There are circumstances where unions have made decisions not to be bound by enterprise agreements. Decisions to not seek to be bound by an enterprise agreement would have been made on the basis of the *Fair Work Act* as it applied at that time. If the Bill was to pass as currently drafted, that would now mean that a union in that circumstance will lose its right to enter the workplace in that enterprise without an invitation from an employee. If the union had known that they would in the future right of entry would depend on an invitation from an individual employee if they were not bound by an enterprise agreement, they may well have made a different decision. Such a result is unfair.

Whilst we oppose the amendments in total, if the substantive change is to proceed, the new regime should only apply in respect of industrial instruments entered after the proclamation date.

Location of discussions and interviews

The CPSU is also concerned that the Bill proposes to repeal the default arrangement that allows access to lunch rooms where the parties cannot agree on a suitable room for discussions or interviews to occur.

These provisions were passed in amending legislation last year and only took effect on 1 January this year. The provisions were sensible and modest amendments that enhance employees' rights to be represented in the workplace and reduce the opportunities for disputation.

By removing these provisions, the Bill creates a situation where an employer can decide the room in which an organiser must meet with employees and the route an organiser has to take to that room. To successfully challenge an employer's decision to put the union organiser in a particular room, the union would have to be able to prove the manager intended to intimidate employees, discourage their attendance or make it difficult for employees to participate; or that the room itself is unfit.

In our experience in operating under these arrangements previously, this is a very high bar.

It is necessary to prove that the employer intended for employees to be intimidated, intended employees to be discouraged from participating in discussions with the union or intended to make it difficult for employees to attend. So even if a request had the effect of intimidation, discouraging attendance or making attendance difficult, that is not enough for a union to challenge the employer's request to hold discussions or interviews in a particular location.

By repealing these provisions, the Bill allows situations where employees are implicitly or explicitly intimidated or discouraged from participating in union discussions and undermines employees' rights to representation in the workplace.

The CPSU outlined issues with right of entry that we have experienced in our submission to the Senate Committee Inquiry into the *Fair Work Amendment Bill 2013*. Prior to last year's amendments to the Act, common issues the CPSU had with right of entry included:

- At certain Telstra sites it was common for CPSU organisers to be directed to a room on a different level of the building from that of many of the employees the organiser wished to speak with or a level of the building not all employees can access. At another Telstra site, the CPSU organiser was directed to a room with only 2 chairs, thereby frustrating the organiser's ability to discuss issues with the numerous members at that site. It was also a common experience for CPSU organisers to be informed upon attending the Telstra site the room booked for their visit was double-booked or is otherwise unavailable.
- In a public service agency, the CPSU organiser was placed in an open area, with the supervisor workspace nearby and within earshot. As the supervisor was able to overhear any conversation, many employees feel uncomfortable with talking with the union organiser and instead meet with the organiser off-site.
- In a large public service agency, 1600 staff work across 6 floors of the building and a majority of staff take lunch in a large common room on the 6th floor. The agency consistently directed the organiser to a small meeting room on the 2nd floor. This has the effect of discouraging employees and members from meeting with the CPSU during lunchtime.

The current provisions also have the added benefit of reducing tension and disagreement in the workplace between unions and employers. Having a default arrangement sets a standard about what parties can expect and provides clarity about what occurs where agreement cannot be reached.

The CPSU has been using the new provisions for right of entry for discussion purposes since January. After discussions with employers about how those provisions operate, we have had no complaints from employers or employees about using lunch rooms for discussions.

Employees appreciate the easy opportunity to talk to the union in a place they usually have a break and do not feel intimidated about talking with the union. The union is very respectful of the rights of employees to engage or not engage with the union. In our experience improved right of entry has assisted in building productive and collaborative relationships in the workplace.

Frequency disputes

Finally, the CPSU is concerned that the Bill amends the criteria for dealing with frequency of entry disputes. The amendments change the criteria the Fair Work Commission has to consider in dealing with these disputes, and places undue emphasis on the employer's operations and resources.

This will create disputation and allow some employers to raise spurious objections to union entry, the effect of which is to deny employees' the capacity to access their union in the workplace.

Transfer of business

The Bill proposes to create a new exclusion to the definition of 'transfer of business'. Specifically transfer of business will not apply where a new employer is associated with the old employer and before termination with the old employer the employee sought to become employed by the new employer at the employee's initiative.

The CPSU is concerned by the potential breadth of this exclusion.

An employee in a situation where the business they work for is being transferred would often be faced with the prospect of no job or transferring to the new employer's business. Given the proposal in the Bill an employee in this situation who chose to keep a job would lose the protections of the transfer of business provisions of the *Fair Work Act*.

The changes proposed in the Bill undermine the transfer of business provisions and in many situations will render those provisions of the *Fair Work Act* useless.

The amendments would also be open to exploitation. Recalcitrant employers could restructure their operations, offer employees the option of no job or a new job in a different corporate entity, and use that transfer to unilaterally reduce employees' wages and conditions.

Payment for annual leave on termination

The Bill also seeks to reduce the annual leave payments due to employees on termination. The Bill would establish that employees only receive annual leave loading and other allowances on unused annual leave balances on termination, if an award or enterprise agreement expressly provides to that effect.

This will have very clear and detrimental impacts for employees, including for employees in industries we represent, and the CPSU opposes the amendment.

It is also noted that this would apply to all termination of employment after the Bill receives Royal Assent. As the Bill does not allow for any grandfathering of current arrangements this change would have immediate implications for employees.