AUSTRALIAN BUSINESS INDUSTRIAL

FAIR WORK AMENDMENT (REMAINING 2014 MEASURES) BILL 2015

SUBMISSIONS TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE INQUIRY

About ABI and the NSW Business Chamber Ltd

Australian Business Industrial (**ABI**) is registered under the *Fair Work (Registered Organisations) Act 2009* and has over 4,200 members and the NSW Business Chamber Ltd (**NSWBC**) is registered under the (NSW) *Industrial Relations Act 1996* and is a State registered association recognised pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009.*

The NSWBC has over 19,000 members.

ABI comprises those NSWBC Ltd members who specifically seek membership of a federally registered organisation. The elected councillors of ABI also constitute and sit as the Workplace Policy Committee of the Council of the NSWBC.

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Introduction

These are the submissions of Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**) to the Senate Education and Employment Legislation Committee (**Committee**) about the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (**Bill**).

ABI and the NSWBC thank the Committee for the opportunity to comment and they welcome the Committee's consideration of the Bill. The Bill follows the passage of the *Fair Work Amendment Bill 2014* which had sat for some time and was then brought on with relatively little notice. It is clear that a number of members of the Senate were uncomfortable about agreeing to, or modifying, a number of the parts of the Amendment Bill. The Assistant Minster for Science said in the Bill's second reading speech to the House

> *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]

Whilst ABI and NSWBC would like to see remaining measures enacted as soon as practicable, they recognise that the case for legislative amendment should be properly made out. In the case of workplace relations legislation this is complicated by the fact that much of it has been enacted without a regulatory impact statement. That is not the case with the Bill.

[1] Mrs Andrews, Second Reading speech: *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* , 3 December 2015 at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F9739759a-c55b-417a-aa76-1072aaf7e717%2F0079;query=Id%3A%22chamber%2Fhansardr%2F9739759a-c55b-417a-aa76-1072aaf7e717%2F0075%22.

Recommendations

Recommendation 1:
That the Committee recommend passage of Part 1 of Schedule 1 of the Bill with effect immediately after the commencement of sections 59 – 168 of the *Fair Work Bill 2009.*

Recommendation 2:
That the Committee recommend
(i) passage of Part 2 of Schedule 1 of the Bill with effect immediately after the commencement of sections 59 – 168 of the *Fair Work Bill 2009*
(ii) amendment of item 3 of Schedule 2 of the Bill to read "The amendment made by Part 2 of Schedule 1 of the amending Act does not apply to leave which has been credited or taken prior to the day after the Act receives the Royal Assent."

Recommendation 3:

That the Committee recommend passage of Part 3 of Schedule 1 of the Bill as proposed.

Recommendation 4:

That the Committee recommend passage of Part 4 of Schedule 1 of the Bill as proposed.

Recommendation 5:

That the Committee recommend passage of Part 5 of Schedule 1 of the Bill as proposed.

Recommendation 6:

That the Committee recommend passage of Part 6 of Schedule 1 of the Bill as proposed.

Submissions

Background to the Bill

The Bill has its origins in the making of the *Fair Work Act 2009* (**Act**).

Both the *Fair Work Bill 2008* and its predecessor enabling legislation, the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* received a Prime Ministerial exemption for exceptional circumstances from an impact assessment and both bills were tabled without a regulation impact statement. A Prime Minister's exemption for exceptional circumstances required the resulting legislation to be assessed by a post-implementation review. The review was undertaken by an expert panel (**Panel**) which issued its report, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation*. The report, which was accepted by the Office of Best Practice Regulation as satisfying post-implementation review requirements, made recommendations for changes where provisions did not achieve their object or where the change would better ensure fair outcomes.

A regulation impact assessment is really directed towards the trade-off between regulation and its impact on productivity or the drivers of productivity. Under the best practice regulation rules applying at the time, the question of whether an impact assessment was required was determined by the extent to which the proposed regulation was likely to have an impact on business and the not-for-profit sector. The Panel's review went wider than a formal post-implementation review and its recommendations were shaped by considering wider views and wider impacts than those on business and not-for-profit undertakings. In its letter accompanying the report to the then Minister, the Panel said

> *In accordance with the terms of reference, this report is a review of the Fair Work legislation, being the Fair Work Act 2009 (Cth) and the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth). This report is also a post-implementation review of the Fair Work legislation, which meets the Australian Government's regulation impact analysis requirements.*[2]

The effect of this wider review is that the impact of the Fair Work legislation on business and the non-for-profit sector was balanced against others' perceptions and evidence about the impact of the legislation on employees and unions. Recommendations in the Panel's report which might be perceived to "favour" employers are to this extent balanced away in a way which is not typical of impact statements or post-implementation reviews.

[2] P 3, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012

The Bill

The Bill reintroduces those parts of the *Fair Work Amendment Bill 2014* which were not enacted during the passage of the *Fair Work Amendment Act 2014* on 11 November 2015. Schedule 1, which is in six parts, contains the Bill's substantive amendments. Schedule 2 provides transitional and commencement provisions. Schedule 2 is not dealt with separately in these submissions.

Schedule 1

Part 1

Part 1 of the Bill addresses the Panel's recommendations about the payment of accrued untaken annual leave on termination. As the Committee will know that while the entitlement to annual leave loading is widely distributed across the modern award system payment of loading on termination is not.

Items 1 and 2 are consequential amendments and item 3 amends the current s 90(2) of the Act. S 90(2) provides

> "*If, when the employment of an employee ends, the employer 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*."

S 90(1) provides that, as an entitlement under the National Employment Standards (**NES**), annual leave is paid at the employee's base rate of pay. The uncontroversial intent of s 90(2) is to provide that a terminating employee is paid the same hourly rate for the payout of untaken accrued annual leave as (s)he would have been paid if the leave was taken during the course of employment. With the sole exception of payment in lieu of notice which is paid at the employee's full rate of pay all other monetary entitlements provided under the NES are provided at the base rate of pay. In the case of payment in lieu of notice the employee is to be compensated as if (s)he had worked out the notice period and been entitled to the relevant penalties, loadings and other separately identifiable amounts that pattern of work would have attracted.

However, there has been ambiguity as to whether s 90(2) extended beyond the employee's hourly rate to include the separate entitlement to annual leave loading. Division 6 of Part 2-2, "National Employment Standards", of the Act, which includes s 90, provides a statutory minimum entitlement to paid annual leave. The Panel said

> *While it is not clear beyond doubt whether s. 90(2) was intended to preserve existing arrangements for the payment of leave loading on termination, the interpretation of the provision by the FWO, in contradistinction to the interpretation by many employer representatives, has*

meant that longstanding arrangements under awards and enterprise agreements have been disturbed.[3]

The Panel concluded

Backed with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s. 90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees.

[…] The Panel recommends that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect. [4]

This ambiguity about s 90(2) has only recently been resolved. The decision of the Full Court of the Federal Court in *Centennial Northern*[5] determined that where an employee has an entitlement to annual leave loading, loading is to be paid on accrued untaken annual leave which is paid out on termination.

The NES was not understood to have this effect

There is strong evidence that s 90(2) was not perceived to alter the *status quo* with respect to the payment of annual leave loading on termination of employment. S 55 of the Act provides that a modern award must not exclude the NES or any provision of the NES. If it was required by the NES, a modern award could not exclude an entitlement for annual leave loading to be paid out on termination, and a term which did so would be to no effect (s 56). Yet modern awards which provided for the payment of annual leave loading when leave is taken were made by the Australian Industrial Relations Commission with terms explicitly excluding the payment of annual leave loading on annual leave paid out on termination. The Panel noted:

The provision has been interpreted by the FWO, based on advice from Senior Counsel, as requiring the payment of an annual leave loading entitlement, even where award or agreement provisions specifically preclude payment of the loading. […].

The provision of annual leave loading was originally to compensate employees for the notional loss of overtime earnings while on leave, although the benefit then spread to most sectors of the workforce, including areas not generally subject to overtime payments. A common feature of award leave loading provisions historically was that leave loading was not payable on

[3] P 100, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012
[4] P 22 and p 100, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012
[5] *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 100 (23 July 2015)

termination. Advice tendered to the Senate's Education, Employment and Workplace Relations Committee by the FWO was that 112 modern awards include provision for annual leave loading, 29 of which either explicitly or implicitly provide that the loading is not payable on termination of employment, a further nine provide that it is payable and 74 are silent on the issue. [6]

Annual leave loading was not intended to be caught by the NES

There is also strong evidence that this outcome was not the intention of the Parliament. Prior to introducing the *Fair Work Bill 2008* a draft of the NES was released for comment. The draft of what became s 90(2) was in the following terms

> "*If, when the employment of an employee ends, the employer has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee under subsection (1) if the employee taken that period of annual leave*."[7]

This was described in the discussion paper as providing the entitlement for the employee to be paid for untaken leave accrued to the point of termination on termination of employment.[8] The explanatory memorandum to the *Fair Work Bill 2008* does not comment on the changed wording in the *Fair Work Bill 2008*.

While there was no regulatory impact statement, the explanatory memorandum to the *Fair Work Bill 2008* comprised a regulatory analysis (pp iv – lxxxiii) and a clause by clause analysis (pp 1 – 429). The regulatory analysis proceed on the basis of assessing equity and the consequent responses of employees and employers

> *r. 31 Changes to minimum employment standards can afford a benefit to employees if they are increased, in which case they would impose a cost on business that has to pay for the increased standard. Or if a standard is reduced then this affords a benefit to business that has a lowered cost, but imposes a cost on employees who have a reduction in their standards. Therefore, it can be seen that changes to employment standards result in a transfer or redistribution between employers and workers.*
> *r. 32 What matters when assessing the impact of the change to employment standards is:*
> • *the equity effect of any transfer or redistribution between employers and employees; and*
> • *the behavioural responses of employers and employees to a change in employment standards*.[9]

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[6] Pp 99 – 100, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012
[7] P xii, Discussion paper, *National Employment Standards Exposure Draft*, Department of Education, Employment and Workplace Relations, 2008
[8] P 23, paras 129 – 130, Discussion paper, *National Employment Standards Exposure Draft*, Department of Education, Employment and Workplace Relations, 2008
[9] P xiii, Explanatory Memorandum, *Fair Work Bill 2008*

In the case of annual leave there was no redistribution of entitlement contemplated. The regulatory analysis advised of the *Fair Work Bill's* NES annual leave provisions

> *r. 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.*
> *r. 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*.[10]

At the time the annual leave entitlement with which the NES was being compared was annual leave provided under the Fair Pay and Conditions Standard (**Standard**) which was also paid at the base rate of pay. The Standard unambiguously did not require payment of an annual leave loading entitlement where it existed on termination. Any such obligation was a matter for awards, agreements or contract. Commenting on what was at the time the FWO's interpretation, the Panel said

> *For employers who traditionally have not had to pay annual leave loading on termination, they have incurred an additional cost in paying out the annual leave on termination. Leave loading typically amounts to 17.5 per cent on the base rate of pay, depending on the relevant modern award or enterprise agreement. It is impossible to quantify the cost of this change to the economy overall, as there is no way to gauge how much leave is owed to employees whose employment has been terminated, what their base rate of pay is, what the relevant leave loading is, how many employees are covered by awards or agreements that provide leave loading and whether all employers have been meeting the new requirement. It is, however, noted that the interpretation of the requirement would have the most negative impact on affected small businesses*.[11]

At the same time as this was being written the Fair Work Commission (**Commission**) approved an enterprise agreement which provided annual leave loading and explicitly provided that annual leave loading was not paid on accrued untaken leave paid out on termination. The Commission recognised that the FWO's view was arguable but concluded that the operation of s 90(2) was confined to paid annual leave, and did not include the entitlement under the agreement to annual leave loading.[12]

[10] P xvii – xviii, Explanatory Memorandum, *Fair Work Bill 2008*
[11] P 100, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012
[12] Paras 40 – 42, *Goodstart Early Learning Enterprise Agreement 2012*, [2012] FWA 2408 (10 April 2012)

Commencement

Centennial Northern has far reaching implications for most employers. The Court's determination means that all employees who had an entitlement to annual leave loading whose employment has terminated since the commencement of s 90(2) on 1 January 2010 should have been paid annual leave loading on their untaken annual leave, including those terminating employees who were employed under awards or agreements which explicitly exclude payout of loading on termination.

Item 2, Commencement, of the Bill provides that Part 1 commences the day after the Royal Assent. Item 2 of Schedule 2 of the Bill provides that the Part 1 amendments would apply to terminations of employment on and from the day after Assent. This is inappropriate in the circumstances of these amendments which seek to correct an unintended consequence which affects the vast majority of employers and reaches back to 1 January 2010. The application of Part 1 should extend back to employment which has terminated since 1 January 2010.

Retrospectivity is not generally appropriate and should only be considered in exceptional circumstance. It might be noted that the commencement of Part 1 will not affect an entitlement to payment of annual leave loading on termination of an employee's employment where such payment is provided by an award, enterprise agreement or contract, and nor would its retrospective operation affect payment which has already made on the basis of the *Centennial Northern* understanding of s 90(2) of the Act.

Recommendation 1:
That the Committee recommend passage of Part 1 of Schedule 1 of the Bill with effect immediately after the commencement of sections 59 – 168 of the *Fair Work Bill 2009.*

Part 2

Item 4 repeals s 130(2) which provides an exception to the general rule under s 130(1) that an employee is not entitled to accrue or take leave of absence whilst on a period of workers' compensation. S 130(2) provides that such leave can be taken or accrued if that is permitted under a workers' compensation law.

However, the reach of s 130(2) was ambiguous. Although there were state compensation laws which explicitly permitted a worker to accrue or take of one or more types of leave whilst on a period of workers' compensation, most did not. However, most other workers' compensation laws contained provisions which, in response to the High Court's decision in *Thompson v Armstrong*[13], did not preclude the payment of workers' compensation in the event that an employee was otherwise entitled to take leave.

[13] *Thompson v Armstrong and Royse Proprietary Limited* [1950] HCA 46

The explanatory memorandum to the *Fair Work Bill 2008* advised that the effect of clause 130 of the bill was to switch off the accrual and taking rules for the time that the employee was absent on workers' compensation, but not impact the calculation of the employee's service or continuity.[14]

The Panel noted

> *Section 130 of the FW Act is, regrettably in the majority of the Panel's view, not clearly worded. Under s. 130(2) an employee who is receiving workers' compensation payments under a Commonwealth, state or territory workers' compensation law may accrue annual leave if the relevant workers' compensation law permits this type of accrual. This is an exception to a general rule posited under s. 130(1) that an employee is not entitled to accrue any leave or absence entitlement if they are absent from work because of a personal illness or injury for which they are receiving compensation payable under a Commonwealth, state or territory compensation law. Advice from the FWO is that only the Commonwealth's and Queensland's workers' compensation laws unequivocally allow the accrual of annual, personal and long service leave, and that Queensland is the only jurisdiction that allows workers to take all of these leave types while on workers' compensation. Tasmania is the only other state that unequivocally allows workers to take leave (annual and long service) while on workers' compensation.*
>
> *The situation for the remaining jurisdictions is that the accrual or taking of leave is either equivocal or not permitted. For employers and employees covered by workers' compensation schemes in South Australia, the Australian Capital Territory and Tasmania, the ability to accrue some types of leave is unclear. […] The effect of the provision is that employees covered by the Commonwealth or Queensland workers' compensation legislation accrue leave while on workers' compensation, which represents an additional cost to their employer relative to other jurisdictions. […].*[15]

It recommended

> *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*.[16]

In making its recommendation the Panel was fully aware that there were employers under some workers' compensation schemes where there was a clear entitlement to the accrual and taking of paid leave, but formed the view that under a national workplace system this type of entitlement should not be determined by state boundaries. It was fully aware that its recommendations meant that some employees would therefore lose a benefit.

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[14] P 83, Explanatory Memorandum, *Fair Work Bill 2008*
[15] P 88, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012
[16] P 89, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012

Clarification of the possible ambiguity

Again a recent decision of the full Court of the Federal Court has determined the meaning of s 130(2) of the Act. In *Anglican Care*[17] the court determined that "permits" is to be read beneficially and that s 49 of the (NSW) *Workers Compensation Act 1987* which was to address the *Thompson v Armstrong* decision permitted accrual and taking of paid annual leave whist on workers' compensation. Until *Anglican Care* no-one had read s 130(2) to mean that the NSW workers' compensation legislation permitted in the requisite sense the accrual and taking of paid annual leave whilst on workers' compensation.

Commencement

Anglican Care has significant implications for most employers. For some employers the effect will be to also trigger a s 90(2) obligation if that were not to be rectified by the passage of Part 1 of the Bill. The meaning of s 130(2) the Court has determined applies from its commencement on 1 January 2010 and appears to apply to all jurisdictions which were not unambiguously subject to the s 130(2) exemption.

Anglican Care means that all employers in jurisdictions where they were not required to credit leave accrual will have to go back and do so for employees on workers' compensation since 1 January 2010.

Item 2 of the Bill commences Part 2 the day after Assent. Item 3 of Schedule 2 of the Bill gives effect to Part 2 for employees starting a compensation period after its commencement, that is, to a compensation period beginning the day after the day of Assent. This is inappropriate. Part 2 should be enacted with retrospective effect.

There is some complexity here. It would be inappropriate for retrospectivity to result in an employee losing leave which had been credited (and/or taken) since 1 January 2010 and for employees who are subject to workers' compensation law where there was explicit provision for a s 130(2) exemption for losing that entitlement ahead of the future commencement of the amendment.

Recommendation 2:
That the Committee recommend
(i) passage of Part 2 of Schedule 1 of the Bill with effect immediately after the commencement of sections 59 – 168 of the *Fair Work Bill 2009*
(ii) amendment of item 3 of Schedule 2 of the Bill to read

"The amendment made by Part 2 of Schedule 1 of the amending Act does not apply to leave which has been credited or taken prior to the day after the Act receives the Royal Assent."

[17] *Anglican Care v NSW Nurses and Midwives' Association* [2015] FCAFC 81 (5 June 2015)

Part 3

An Individual Flexibility Arrangement (IFA) is an arrangement between an individual employee and his or her employer to alter the effect of one or more specified terms of the award or enterprise agreement applying to the employee in a way which meets both their needs. The award terms which can have their effect altered by an arrangement are specified in the standard award clause. To comply, the arrangement must leave the employee better off overall than (s)he would otherwise have been under the relevant instrument. The flexibility arrangement substitutes for that employee and employer the identified term or terms in the relevant award or agreement, and because the arrangement differs from the face of the award or agreement, provision is made for terminating it.

The amendments in Part 3 address three problems which have affected the utility of IFA's for employees and employers because they undermine certainty about an agreed arrangement. Uncertainty means that flexibility arrangements are both less feasible and less attractive for one or both parties. These problems are

1. Uncertainty about whether a proposed flexibility arrangement which would otherwise incur additional payment under the award or agreement would meet the better off overall test;
2. Uncertainty about the continuity of a flexibility arrangement because either party can unilaterally terminate the arrangement with short notice;
3. Uncertainty about the stability of a flexibility arrangement because existing IFA's are terminated by the commencement of an enterprise agreement. The standard "Award Flexibility" term is negotiable for enterprise agreements and the terms of the agreement can preclude a replacement. The standard flexibility term is only inserted into an agreement which does not deal with flexibility arrangements.

In its current form the legislation and its underlying policy with respect to IFA's is somewhat difficult to follow. IFA's which are made when a modern award applies to the employee are dealt with by different sections of the Act from those made under an enterprise agreement applies. That is not unusual but the "award" and "agreement" IFA termination provisions are not in the same terms.

Uncertainty about meeting the better off overall test

Section 144 requires modern awards to have a flexibility term, s 144(4) identifies the requirements for a complying IFA including that the IFA leaves the employee better off overall than (s)he would otherwise be under the award (s 144(4)(c)). S 145 deals with the situation of an IFA which does not comply with the s 144 requirements. For an employee to whom an enterprise applies, s 203 identifies the requirements for a complying IFA, including that it leave the employee better off overall than if there was no arrangement (s 203(4)). S 204 deals with the situation of an IFA which does not meet the s 203 requirements.

It is clear that the intention of the FW Act was to provide for circumstances where an employee wished to alter his or her working arrangements in a way which attracted extra payment or rate of pay under the applicable instrument. These situations most obviously occur when the employee wishes to retain his or

her current number of hours but work them in a way which moves outside the span of ordinary hours or reduces a break. The penalties for not meeting the better off overall test are effective and these types of request are often not made because the employee knows the request costs money, or not agreed to because the employer knows the request could cost money.

In its introduction to s 144, the explanatory memorandum cites as an example of an IFA providing altered working hours for a parent or guardian to enable him or her to drop off or pick children up from school. The illustrative example raises the situation where a non-cash benefit to the employee (arriving late/leaving work early to drop off/pick up children) properly offsets a cash "loss" (ending later or starting earlier than the span of hours and not being paid at 1.5 time). This intention is more explicitly identified in the explanatory memorandum where it deals with s 203 (requirements to be met by an IFA under an enterprise agreement). [18]

The better off overall test operates in two totally different contexts under the FW Act. The test is to be met for IFA's where non-monetary benefit is contemplated, but also for the approval of enterprise agreements where offsetting non-monetary benefits are not contemplated. The Expert Panel said:

> *The operation of the BOOT, as a minimum, in this statutory context (in contradistinction to the enterprise agreement approval process), should be clarified in certain respects. It should be made clear that the BOOT can be satisfied by the provision of a non-monetary benefit to an employee in exchange for a monetary benefit provided that the nonmonetary benefit is proportionate to the monetary benefit foregone and the latter is relatively insignificant.*[19]

The Expert Panel recommended that s 144(4)(c) and s 203(4) be amended to provide that the better off overall test permit a non-monetary benefit on the employee where the employer "receives" the benefit of the employee's foregone benefit provided the amount is not significant and is proportionate.[20]

In most cases the amount of foregone benefit is easily calculated. This addresses the relative significance of the foregone benefit but the question of whether the non-cash benefit to the employee is proportionate is not really addressed by the recommendation. Item 5 of the Bill requires the employee to state in writing that (s)he believes the arrangement meets his or her needs and results in him or her being better off overall – a genuine needs statement. Item 5 and item 13 (which is in similar terms for enterprise agreements) address proportionality as well as significance. The Act's anti-coercion provisions apply.

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[18] Para 570, p 93, para 860, p 136 and para 867 p 137, *Explanatory Memorandum*, *Fair Work Bill 2008*. At P 136 Danae is identified as working longer hours on three days a week, to accommodate the shorter hours on the two days she leaves early to pick up children.

[19] P 108, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012

[20] P 22 and P 109, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012

However, s 144(4)(ca) imposes a requirement on the standard award clause and therefore requires its variation. Item 2 of the Bill commences item 5 six months after Assent to enable the Commission to vary awards to require the employee's genuine needs statement as part of a complying IFA process. Item 13 would commence on Proclamation or 6 months after Assent. In both cases the requirement for a genuine needs statement would apply to IFA's made after the relevant commencement date.

Items 7 and 12 (for agreements) insert notes which are consistent with the amendments.

The Panel also recommended that an employer should notify the Fair Work Ombudsman of an IFA when entered into and the award or agreement which it was attached to (Recommendation 10). It further recommended that where an employer had complied with the proposed notification requirements and believed on reasonable grounds that the IFA met the requirements for a flexibility arrangement this should constitute a defence against breach of s 144 or s 203 (Recommendation 11).

Item 9 which inserts a new s 145AA (for IFAs linked to an award) and item 17 which inserts a new s 204A (for IFAs linked to an agreement) gives effect to Recommendation 11.

Recommendation 10 has not been given effect to in the Bill and nor has it been in any earlier post-review amending legislation. It does sit uncomfortably with the idea behind IFA's and, given the near certainty of widespread technical breach that these types of notification requirements give rise to, recommendation 10 seems a discernible example of the impact on businesses and not-for-profits being balanced away by the review's wider terms of reference.

In the 2 year review of modern awards, which followed the release of the Panel's report, the Commission was not persuaded to insert similar types of notification requirements into the standard award flexibility provision despite altering the clause in other ways, including by extending the notice of unilateral termination of an IFA under an award (dealt with further below).[21]

Uncertainty about the arrangement continuing

It is uncontroversial that the capacity to unilaterally terminate an IFA with short notice has inhibited take-up. The current situation is that there are different unilateral termination standards for IFAs made under an award from those made under an enterprise agreement. There is no readily discernible policy reason for these differences.

In modern awards the standard form of the "Award Flexibility" clause was determined by the Commission during award modernisation and it provided that an IFA can be terminated unilaterally with 4 weeks' written notice. The Act provides that a complying IFA made by an employee to whom the award applies must contain a term which sets out how the arrangement may be terminated by either party (s 144(4)(d))

[21] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170.

and there is no explicit requirement about notice of unilateral termination. The Act defers to the award's standard unilateral termination clause[22] and both are silent about termination by agreement.

The Panel recommended that both s 144(4)(d) and s 203(6) (which is the equivalent of s 144(4)(d) when an enterprise agreement applies to the employee) be amended to provide that unilateral written notice of termination is given 90 days in advance, or some shorter period which is agreed by the parties.[23]

Subsequently during its 2 year review of modern awards the Commission varied the standard modern award flexibility term to provide that a complying IFA which is made by an employee to whom the award applies is able to be terminated unilaterally by 13 weeks' written notice and at any time by mutual agreement.[24] Item 6 amends s 144(4)(d) to make it consistent with the new standard award notice of unilateral termination term and to address termination by agreement.

The timing of unilateral termination of an IFA made under an enterprise agreement is not dealt with in the same way. The Commission's standard clause made in the modernisation process established the standard for IFA's made under an agreement. [25] S 203(6) of the Act provides that unilateral termination requires not more than 28 days' notice. The standard award clause, including the not more than 28 days' notice provision, was adopted in the regulations as the flexibility clause for agreements which do contain a complying flexibility term.[26] Item 14 amends the notice of unilateral termination provision in s 203(6) to make it consistent with notice of unilateral termination of an IFA under an award.

The consequences of enacting items 6, 9, 14 and 16 is that there would be unilateral notice of termination of 13 weeks and not more than 28 days' notice in the case of a non-complying IFA.

Uncertainty about the impact of bargaining

When an enterprise agreement comes into operation, except for its minimum classification rates, an award covering the employees ceases to apply. This includes an IFA which is altering the operation of the award for an individual employee. Agreements must contain a flexibility clause but which clauses in the enterprise agreement can the subject of an IFA is subject to a negotiated outcome. The Panel had convincing evidence before it that enterprise agreements were restricting the matters which could be the subject of a flexibility arrangement with an employee.[27]

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[22] S 145 FW Act provides that in the event that an IFA does not meet the s 144 requirements it continues as if an IFA and s145(4) provides that either party can terminate it with not more than 28 days' written notice.
[23] P 22 and 109,
[24] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170. The change took effect on 4 December 2013.
[25] Paras 863 – 864, P 136, *Explanatory Memorandum, Fair Work Bill 2008*
[26] Schedule 2.2 of the FW regulations
[27] P 164, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012

This is counter the policy intention of the Act which is that IFA's should be available to employees and employers to meet their specific circumstances. S 202(1) requires an enterprise agreement to have a flexibility term and s 202(4) deems the model term as a term of the agreement if the agreement does not provide its own term.

> *Recommendation 24: The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties*.[28]

Items 10 and 11 amend s 203(2) so that an enterprise agreement flexibility term would have to permit IFA's to be entered into for the same range of matters, provided the agreement dealt with them, as an award. This would enable an employee and employer to continue with his or her arrangement under the agreement as they had entered into under the award.

Recommendation 3:

That the Committee recommend passage of Part 3 of Schedule 1 of the Bill as proposed.

Part 4

Until the Act's commencement on 1 July 2009, the question of which industrial instrument applied to a transferring employee at the new employer was determined by whether there was a transmission of business between the two. The Act replaced the transmission of business test with the new concept of a transfer of business. The transfer of business provisions operate well beyond the situation where an employee transfers to a new employer because the new employer has brought an existing business or part of it.

There is a transfer of business when an employee terminates from an employer within 3 months takes up similar employment with a new employer in the situation where the new employer has a connection with the former employer. A connection may be transfer of assets, a transfer of work or that the two employers are associated entities. One implication of these new transfer provisions is that the termination of the "transferring employee" from the old employer and his or her engagement by the new employer may be totally unrelated to the connection between the two employers. The employee may not be aware of the connection and the new employer may not initially know of the employee's former employment. This seems excessive.

The Bill is more confined. Part 4 addresses the question of transfers between two employers which are associated entities. Under the Act there is capacity for the Commission to order that the former instrument does not apply to the new employment and also that an instrument applying at the new

[28] P 23 and 164, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012

employer applies to the transferring employee. This requires the Commission to assess the relative disadvantage and impact of the old instrument on the transferring employee(s) and the new employers' operations, and to consider the views of the employer and the employee's concerned. The case must be made out and this is so even where the employee himself or herself has sought the transfer, perhaps for a better future career path, perhaps for better conditions.

> *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*.[29]

Items 19 and 20 have the effect of excluding from the transfer of business provisions the situation where the employee has initiated the move between associated employers. Thus, for example, an employee who requests to transfer between two businesses which are associated employers before terminating from the first employer would not fall within the transfer of business provisions, and therefore not bring an enterprise agreement or enterprise award applying to the first employer but not the second to the new employer, 0or would not require an application to the commission for an order. This is consistent with the Panel's Recommendation 38.

Recommendation 4:

That the Committee recommend passage of Part 4 of Schedule 1 of the Bill as proposed.

Part 5

Right of entry is contentious. Right of entry suspends normal property and employment rights and potentially interferes with the full enjoyment of employees' association rights. The explanatory memorandum[30] to the *Fair Work Bill 2008* advised that the bill retained the existing fair and balanced framework for union officials' entry and gave the Commission the capacity to deal with abuses by either union officials or employers being unreasonable. The bill also retained provisions making right of entry provisions a code which could not be supplemented nor derogated by an award or an enterprise agreement.

At the time of its review the Panel made three recommendations about the right of entry regime. It recommended to

[29] P 206, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012
[30] P iii, Explanatory Memorandum, *Fair Work Bill 2008*

1. give the Commission greater power to resolve disputes about frequency of entry (Recommendation 35);
2. give the Commission greater power to resolve disputes about the on-site location for discussions and interviews (Recommendation 36);
3. allow, in limited circumstances, union officials to enter to investigate a suspected breach affecting a former employee (Recommendation 37).

It is uncontroversial that any lawful exercise of the right of entry is disruptive, and relatively uncontroversial that a balance needs to be struck. Abuses such as over-frequent entry can be a form of covert industrial pressure, and it can be prompted by demarcation struggles. The Panel said

> *Consistent with the evidence presented in submissions, it appears that more frequent visits to workplaces are occurring to hold discussions with members or employees that a union is eligible to represent. Given the broad range of matters that could be discussed, this type of visit need not be for specific purposes. While employers need to allocate time and resources to facilitate a union's permit holder on the premises and to provide a reasonable location for discussions held during meal and rest breaks, in most cases this is not likely to be to the degree required if a union is investigating a suspected contravention. Submissions tend to suggest that this issue is a more significant problem for large worksites where several unions are eligible to represent the employees, such as those in the mining or construction industries.*
>
> *…*
>
> *It is difficult, on the available evidence, to identify whether the instances of frequent visits are excessive such as to demonstrate that the motivations for entry are not consistent with those authorised by the FW Act. We are, however, concerned that this may be the case in some instances and we wish to ensure that the FW Act has mechanisms in place to address this issue*.[31]

In its discussion about the location of interviews and discussions the Panel said

> *As noted earlier, the FW Act's provisions on the location of discussions were created in response to a problem that previously permitted such discussions to be held in inappropriate locations. In the Panel's view, the FW Act right of entry provisions support allowing union representatives to meet employees in the place where they gather, subject to ensuring that undue inconvenience is not caused to an employer. We consider that the FW Act could better meet its objective by providing greater discretion to FWA to determine a reasonable location for interviews and discussions*.[32]

Subsequently the *Fair Work Amendment Act 2013* amended the Act's right of entry provisions with effect from 1 January 2014. That act

[31] Pp 193 – 194, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012
[32] P 197, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012

1. provided the Commission defined powers to hear disputes about frequency of entry to hold discussions and to make orders in circumstances where it was satisfied that the frequency of entry required an unreasonable diversion of the occupier's critical resources;
2. removed the Commission's power to hear disputes about the location of discussions or interviews and provided that the location should be by agreement between the union official and the employer, or failing agreement at the place where the relevant employee(s) take breaks;
3. inserted new provisions requiring an employer with a remote site to provide transport and/or accommodation to entering union officials where these were not publicly available, and to do so on a cost recovery basis, and provided the Commission with power to hear disputes and make orders, including that the accommodation or transport does not need to be provided where its provision would cause undue inconvenience to the occupier.

The *Fair Work Amendment Bill 2013* received a Prime Ministerial exemption for exceptional circumstances[33] and the bill's explanatory memorandum did not provide any impact analysis.

The Bill repeals the *Fair Work Amendment Act 2013* amendments which were not foreshadowed or the subject of Panel recommendations. It also better addresses the potential for abuse of entry to hold discussions with members or those eligible to be members by modifying the enacted frequency provisions and reducing the capacity for a union without a direct representational interest in a workplace, such as being covered by an enterprise agreement applying at the workplace, to enter because it employs people who are capable of membership.

Item 25 requires that entry to hold discussions is either by way of invitation of a member or employee eligible to be a member where there is no agreement which covers the union, or is a standing right (subject to compliance with the rest of Part 3-4 of the Act) where the union is covered by an agreement which applies at the workplace. Items 31 – 35 which provide the Commission power to issue invitation certificates are consequential.

Item 26 restores the pre-*Fair Work Amendment Act 2013* provisions which enable the Commission to hear disputes and make orders where there is a disagreement about where an interview or discussion should take place and repeals the default use of crib or meal rooms. Apart from restoring the earlier status quo, this restores the right of employees who do not wish to participate in discussions during their break. Items 27 and 28 are consequential.

S 505A of the Act was inserted to provide the capacity for the Commission to make orders about excessively frequent entry. As noted above the trigger, the need to show "unreasonable diversion of the occupier's critical resources", is very high, and does not cover significant disruption so long as critical resources are not being diverted. Items 29 – 30 delete this trigger and require the Commission to take into account fairness and the impact of frequent entries on the employer or occupier.

[33] P 43, Office of Best Practice, *Best Practice Regulation Report 2013-14*, Department of Prime Minister and Cabinet, Canberra

Item 33 repeals the *Fair Work Amendment Act 2013* amendments which inserted the requirements on employers with remote workplaces to provide transport and/or accommodation and items 21, 23 – 24 are consequential.

Part 5 would commence on Proclamation or six months after Assent.

Recommendation 5:

That the Committee recommend passage of Part 5 of Schedule 1 of the Bill as proposed.

Part 6

The Act's unfair dismissal provisions attracted a number of recommendations from the Panel including two recommendations which were directed towards reducing the impact of unmeritorious applications, or actions which fall outside the proper carriage of a matter, on respondent employers. Recommendation 43 proposed giving clearer capacity to the Commission to dismiss an application on the papers. The Panel said

> *We also consider there is merit in expanding the capacity of FWA to dismiss applications that are totally lacking in merit, or when an applicant has failed to attend a proceeding, adhere to a settlement or comply with FWA directions. […]*
>
> *Under Work Choices, the tribunal was given express power to decide not to hold a hearing when determining whether a claim should be dismissed for want of jurisdiction or because it was frivolous, vexatious or lacking in substance (see ss. 645 and 646). Presumably to deal with natural justice concerns, if the tribunal decided not to hold a hearing, it was required under s. 648 to invite the employee and employer to provide further information before making a decision. We consider that the FW Act should be amended to include similar provisions. We also believe that FWA's powers to dismiss applications should be extended to cases where a settlement agreement has been concluded, where an applicant fails to attend a proceeding […]*[34]

Item 40 gives effect to this recommendation and items 36 – 39 and 41 – 42 are consequential. Part 6 would apply the day after the Act received Assent to unfair dismissal applications made to the Commission after its commencement.

Recommendation 6:

That the Committee recommend passage of Part 6 of Schedule 1 of the Bill as proposed.

[34] P 229, *Towards more productive and equitable workplaces – an evaluation of the Fair Work legislation,* Department of Education, Employment and Workplace Relations, 2012