

ACTU Submission
**to the Senate Committee on Education and
Employment regarding the Fair Work Amendment
(Remaining 2014 Measures) Bill 2015**



Introduction

The Australian Council of Trade Unions (**ACTU**) is the peak body representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.

We welcome the opportunity to make submissions to the Senate Committee on Education and Employment regarding the provisions of the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (**Bill**).

The Bill contains a range of amendments to the Fair Work Act 2009 (**Act**) that will have a detrimental impact on Australian workers and their families.

These amendments include:

- the abolition of important safeguards on Individual Flexibility Arrangements (**IFAs**), enabling businesses to utilise individual contracts in a similar manner to AWAs to drive down wages and conditions and exploit vulnerable employees;
- changes to the National Employment Standards (**NES**) to restrict payment of accrued annual leave entitlements on termination;
- the introduction of new provisions that over-ride state laws permitting employees to accrue and take various forms of leave whilst in receipt of workers' compensation payments;
- changes to the transfer of business provisions to reduce entitlements for workers that seek to retain their job when a business is sold or transferred to a new employer;
- undermining employee rights to representation by restricting union right of entry for the purposes of discussion with employees; and
- limiting access to a fair hearing in unfair dismissal matters.

The ACTU believes that the Bill goes well beyond the public policy position that was outlined by the Coalition prior to the 2013 election and seeks to bring back key elements of the WorkChoices regime. Prior to the 2013 election the Coalition published a policy document which states that:

“The details of the Coalition’s Policy to Improve the Fair Work Laws are spelled out clearly in this document. Based on the laws as they stand now, the Coalition has no plans to make any other changes to the Fair Work Laws.”

...

The Coalition also said that it would not change the amendments made to the Act in 2013 except as “spelled out” in their Policy.”¹

It is clear that the Coalition has gone beyond these statements in relation to a number of the proposals in the Bill. This submission examines each of the proposed changes below.

This submission also outlines the ACTU's views in relation to the various recommendations made by the Fair Work Review Panel (**Panel**) which the Bill seeks to implement and the likely effect on workers of the proposed changes to the Act.

The Bill is clearly not consistent with the Coalition's policy. There is either a clear intention on the part of the Coalition to go beyond their policy position or the policy was deliberately misleading. The lack of detail in the policy likely obscured the Coalition's intentions for the Act and made it almost impossible at the time the policy was disseminated to determine how it would ultimately manifest as a Bill.

Furthermore, much time has passed since these measures were first put forward and rejected. In that time the Productivity Commission has released its draft report into the workplace relations framework and has completed its final report (although it has not been released at the time of writing). An election is expected in under 12 months which will, if the Coalition's current policy is to be honoured, feature a policy that responds to recommendations made in that report. It seems highly disruptive to now proceed with legislative changes which might not be compatible with those that follow consideration of that report.

We submit that the Committee should recommend to the Senate that the Bill be rejected in its entirety.

Part 1 – Payment for annual leave

Currently, s 90(2) provides that an employee with a period of untaken paid annual leave is entitled to be paid the amount that would have been payable had the employee taken the period of leave. The ACTU submits that the Act operates appropriately in its current form.

An employee is currently entitled to be paid their base rate of pay plus, where an entitlement to leave loading and/or higher rate of pay exists, that leave loading and/or higher rate, on the whole of their accrued annual leave upon the termination of their employment. The higher rate of pay may include the matters set out in s 18 which defines “full rate of pay”. An employee's full rate of pay is defined

¹ The Coalition's Policy to Improve the Fair Work Laws, May 2013, p 11. Available at <http://lpaweb-static.s3.amazonaws.com/Policies/FairWork.pdf>

as the rate of pay payable for ordinary hours of work including payment for incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts. S 16 defines an employee's "base rate of pay" as excluding the matters which s 18 includes.

The Panel made Recommendation 6 that "*[A]nnual leave loading should not be payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect*".² When in opposition the Coalition said it would implement Recommendation 6, adding that "*[T]his will clarify circumstances where annual leave loading is payable on termination to address existing confusion and restore the conventionally accepted approach*".³ The only specific payment that the relevant sections of the EM refer to is annual leave loading⁴. Clearly however, the terms of the Bill vastly overstep the area of leave loading and mean that full rate of pay matters like allowances (for example for particular qualifications or for leading hands) and loadings will also be excluded. The impact of this provision will vary depending on the wording in modern awards and enterprise agreements, and interpretative arguments concerning ambulatory versus point in time references.

S 55(4) deals with ancillary and supplementary terms that may be included in a modern award or enterprise agreement. The Bill proposes to insert a new note (c) into Note 2 which introduces an additional example of a supplementary term which may be included in a modern award or enterprise agreement. This new note provides that when the employment of an employee is terminated and that employee has a period of untaken paid annual leave the employee can be paid the amount that would have been payable had the employee taken the period of leave. The new note goes on to say that the amount payable to the employee may be higher than their base rate of pay as provided for in the proposed new s 90(2).

The new note under s 55(4) operates to ensure that it is clear that payments made to an employee pursuant to s 90(2) at the time of the termination of their employment at the employee's full rate of pay are optional, rather than mandatory. This reverses the current mandatory safety net entitlement to an optional, or circumstantial, "extra". It removes an NES benefit that employees currently enjoy, and in some cases, may have come to rely on since its introduction.

Proposed new s 90(2) removes the current requirement that when the employment of an employee who has a period of untaken paid annual leave ends the employee is to be paid the amount that would have been payable to the employee had he or she taken the period of leave, that is, his or her full rate of pay. As submitted, this full rate of pay includes annual leave loading, allowances and other penalties

² Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 100

³ The Coalition's Policy to Improve the Fair Work Laws, May 2013, p36

⁴ See Part 5 of the EM

and loadings. This change is a significant deviation from the Coalition's proposal to clarify that annual leave loading is only to be paid on the termination of employment where an industrial instrument so provides. This is also a significant departure from the Panel's Recommendation 6.

The Bill provides that the rate to be paid under proposed s 90(2)(b) must not be less than the employee's base rate of pay that applied immediately prior to the termination of the employee's employment. This allows for an employer to opt to pay a higher rate, say for example, the full rate of pay, but it does not mandate it. The option of payment of a higher rate of pay will be left up to the industrial parties to determine either at the time a modern award is reviewed, or an industrial instrument is created.

The Bill also inserts a new note after s 90(2) which refers back to s 55. It appears that the intention of this new note is to make it clear that s 90(2) operates to clarify that there is no inconsistency between the terms of the NES and an industrial instrument where that industrial instrument sets out what rate is payable to an employee at the time of the termination of his or her employment.

In many cases the drafting of the relevant clause in the industrial instrument may not be clear and more than one interpretation may be open. Currently it is assumed that the terms of an enterprise agreement passed the BOOT at the time of approval and would not be in breach of the current terms of s 90(2). In such cases it can be safely assumed that payment at the time of termination of employment is to be in accordance with s 90(2). The proposal means that at the time of termination of employment, the guidance which is currently provided by s 90(2) will be gone. The parties will then be left to resolve a dispute, a process which can, in some cases, be costly and administratively burdensome. Such disputes could be prevented if the wording of s 90(2) was clarified, as per our proposal below.

Some modern awards already clearly provide that an employee with a period of untaken paid annual leave is entitled to payment of leave loading on termination of employment.⁵ Some modern awards say the reverse.⁶ Some are silent on this matter.⁷ Regardless, s 90(2) has been interpreted as requiring that payment at the full rate of pay is required where the employment of an employee with a period of untaken paid annual leave ends.⁸

⁵ See for example the Aluminium Industry Award 2010, the Banking, Finance and Insurance Award 2010, the Fast Food Industry Award 2010, and the Poultry Processing Award 2010.

⁶ See for example the Waste Management Award 2010.

⁷ See for example the Miscellaneous Award 2010.

⁸ See advice to the [Fair Work Ombudsman by Mr J Phillips SC, as tabled before the Senate, Employment and Workplace Relations Committee, Additional Budget Estimates 2010-11](#)

We submit that if the current requirement to pay at the full rate of pay were included in the Bill's proposed s 90(2) and the words relating to payment being calculated at the full rate of pay immediately before the date of termination, the provision would be acceptable.

It is proposed that the amendment take effect the day after the Bill is given Royal Assent, and will apply to all terminations of employment which occur after that date. There is no proportional accrual or grandfathering provided for. This is particularly unfair as some employees will lose entitlements they have accrued during the course of their employment. What the Bill will do is provide an overnight windfall gain to a significant number of employers.

The effect of removing the current entitlement is particularly unfair to employees who are employed under a modern award. These employees are paid relatively low rates and are likely to rely on the payment for untaken paid annual leave at the full rate of pay at the time of the termination of their employment.

Employees should not be financially disadvantaged because they have not taken their full entitlement to paid annual leave at the time their employment ends. There may be many reasons why an employee has not taken some or all of their entitlement to paid annual leave. For example, there may be work pressures which mean they cannot take the paid annual leave such as overwork or no replacement employee, or they may feel that their employment is insecure and taking a period of paid annual leave could jeopardise their position.

There should be no penalty or detriment for an employee who has not taken their paid annual leave during their employment when their employment ends. The Bill creates an incentive for employers to deny, either overtly or covertly, an employee their full entitlement to paid annual leave during employment so that upon the termination of the employee's employment the cost of the annual leave is less than if the employee had taken it while employed. This incentive runs directly contrary to the recognised industrial merit and purpose of annual leave, being that the provision of rest and recreation time to workers benefits those workers as well as their employers. This merit was accepted in the federal award system in 1936,⁹ and by 1945 had become accepted across the industrial relations spectrum from Unions to employers and even the Institute of Public Affairs.¹⁰

Importantly, the proper accounting treatment of annual leave entitlements is that provision be made for the full value of accrued annual leave (including annual leave loading) as a liability on an employer's balance sheet. We also note that the employer can claim a tax deduction when payments are made to an employee. The effect of the Bill is to relieve employers of a portion of the annual leave obligation

⁹ Printing and Allied Trades Employers Federation of Australia & Anor v. Printing Industry Employees Union of Australia & Ors (1936) 36 CAR 738 at 747

¹⁰ Metal Trades Annual Leave Case (1945) 55 CAR 595 at 597

that they are currently required to show as a liability; a significant and unjustifiable “free kick” at the expense of employees.

Part 2 – Taking or accruing leave while receiving workers’ compensation

S 130 of the Act currently provides a broad prohibition on an employee taking or accruing any leave (other than unpaid parental leave) while receiving workers’ compensation payments. We submit that employees should be entitled to accrue and take all types of leave where the relevant workers’ compensation legislation does not expressly prohibit it.

S 130 of the Act prohibits the taking or accruing of the following types of paid and unpaid leave:

- annual leave;
- paid and unpaid personal/carer’s leave;
- paid and unpaid compassionate leave;
- public holidays;
- award-derived long service leave;
- unpaid community service leave; and
- paid community service leave (jury service pay).

The broad prohibition is subject to an exemption in cases where the law under which the workers’ compensation is paid permits the taking or accruing of such leave while in receipt of that compensation. The Bill would remove that exclusion. Recommendation 2 of the Panel was that “section 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers’ compensation payments”.¹¹ The Coalition policy was to implement Recommendation 2, and it said “[T]his will clarify the interaction between workers’ compensation and annual leave pursuant to s.130”.¹²

¹¹ Report of the Fair Work Act Review Panel, “Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation”, 2012, p 89

¹² The Coalition’s Policy to Improve the Fair Work Laws, May 2013, p 36

Clearly this provision of the Bill is a further example of overreach because neither the Panel nor the Coalition suggested any reform in this area in relation to any type of leave other than annual leave; and the Panel recommendation did not extend to prohibiting taking annual leave while on workers' compensation, only accruing it. It should also be recalled that even WorkChoices did not go this far: it allowed annual leave to be taken and accrued unless the relevant workers' compensation law prohibited it.¹³ This meant that workers in most jurisdictions were able to take and accrue annual leave. The current s 130(2) modified the position under WorkChoices by requiring that the relevant workers compensation law expressly permit the taking and accruing of leave.

It is proposed that the amendment take effect the day after the Bill is given Royal Assent, to employees who commence a period of workers' compensation after that period.

The only State where it is clear that employees can take and accrue annual leave, sick leave and long service leave while in receipt of workers compensation is Queensland.¹⁴ Victorian employees can take accrued annual leave or long service leave while in receipt of workers compensation payments, however, the general position is that they cannot accrue these kinds of leave.¹⁵ Employees in New South Wales appear to be unable to take or accrue annual leave as the relevant legislative provision does not impose a right to do so.¹⁶ In relation to Comcare, there are explicit rights to accrue sick leave and annual leave for at least 45 weeks of a compensation period.¹⁷ Because the rights and entitlements of employees in different jurisdictions vary, it is difficult to say with certainty the extent of the potential disadvantage to be suffered by employees as a result of the proposal. This is particularly so when the provision of the relevant workers' compensation legislation is open to different interpretations. This proposed amendment will disadvantage those employees who can currently take and/or accrue different types of leave while in receipt of workers' compensation payments.

S 27(2)(g) of the Act provides that workers' compensation and long service leave are not matters excluded by s 26. This means that state and territory workers' compensation and long service leave provisions should continue to apply to employees. The only exception to this is long service leave provisions caught by Division 9 of Part 2-2. Not only does the proposal to delete s 130(2) go further than the Panel's recommendation and the Coalition's pre-election policy, it effectively encroaches on

¹³ Workplace Relations Act 1996 (Cth) s 237

¹⁴ Workers' Compensation and Rehabilitation Act 2003 (Qld), s 119A

¹⁵ Accident Compensation Act 1985 (Vic), s 97

¹⁶ Workers Compensation Act 1987 (NSW), s 49

¹⁷ Safety, Rehabilitation and Compensation Act 1988, s. 116

the rights of the states and territories to govern workers' compensation and long service leave, introducing a direct conflict of laws contrary to the "field" otherwise signposted by the Act.

An employee receives workers' compensation payments from an insurer or under a scheme if he or she has been injured or has become ill in the course of employment. But for the illness or injury the employee would be at work accruing leave, and potentially taking the leave available to them. To remove this entitlement, particularly given that an employee in receipt of workers' compensation has not chosen to be in such a position, is unjust. In most cases, while an employee receiving workers' compensation payments may not be paid by their employer, they are still engaged by their employer. They should not be left in a position where they are unable to work and are also suffering disadvantage because they are also denied the ability to accrue and take leave.

Further, denying an employee the ability to accrue and/or take annual leave while they are in receipt of workers' compensation payments has the potential to exacerbate their injury or illness. A period of recovery from an injury or illness is different to a period of rest and recreation away from work as a fit and healthy person. The two types of leave are different and perform different functions. Failure to have sufficient holidays can increase the risk of workplace injuries and illnesses, thus creating a cycle of injury and/or illness. There are significant occupational health and safety risks associated with overworked employees including stress and fatigue. These risks would likely be increased if an employee is denied the ability to accrue and take annual leave while in receipt of workers' compensation payments. There are significant costs associated with occupational health and safety and workplace injury and annual leave is a way for employers to avoid these risks and costs while at the same time having a safe workplace.¹⁸

An employee in receipt of workers' compensation payments may rely on their accrued paid personal/carer's leave, or other types of paid leave, to make ends meet, particularly should their weekly workers' compensation payments be reduced over time. Removing the current entitlements will put increased financial pressure on these workers to go back to work before they are fit which defeats the very purpose of workers' compensation. Further, an employer may wish to allow an employee to take a period of annual or long service leave while the employee is in receipt of workers' compensation payments, this may particularly be so where an employee has a large bank of accrued annual or long service leave.

We submit that the most appropriate proposal is for employees to be able to accrue and take all types of leave so long as the relevant workers' compensation legislation does not expressly prohibit it.

¹⁸ See Grant Cairncross and Iain Weller, *Not Taking Annual Leave: What Could it Cost Australia?*, *Journal of Economic and Social Policy*, 9(1) 2004, 11-13

We add that we find it curious that the relevant Part of the Bill that proposes these changes is not discussed in the Regulatory Impact Statement, notwithstanding it is very clear intersection with the Comcare system, particularly at a time when the government is pursuing a policy to open up Comcare to the general market.

Part 3 – Individual Flexibility Arrangements

The Bill opens the way for a return to the most insidious aspects of individual statutory arrangements which were seen under WorkChoices and were emphatically rejected by Australians in 2007. The Bill systematically dismantles the protections inserted by the Act to ensure that legitimate flexibility is exercised in a way which is not detrimental to employees.

There is currently enormous scope within industrial instruments to cater for the flexibility requirements of employers and employees. We submit that the scope for flexibility within industrial instruments removes any need for IFAs. For example the General Retail Industry Award provides that ordinary hours of work are between 7 am until 9 pm Monday to Friday, 7 am to 6 pm Saturday, and 9 am to 6 pm Sunday. Employers such as newsagencies and video shops are subject to specific hours relevant to their industries. Further, in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.¹⁹

Further, the Manufacturing and Associated Industries and Occupations Award includes a span of hours of between 6.00 am and 6.00 pm which may be altered by up to one hour at either end by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.²⁰

The Act provides that modern awards and enterprise agreement must include a flexibility term that enables an employee and his or her employer to agree to an IFA that varies the effect of the applicable award or enterprise agreement in order to meet the genuine needs of the parties and sets out the terms of the relevant instrument which may be varied by an IFA.

Amendments are proposed to the flexibility term in awards and agreements, and to the enforcement and termination of IFAs.

¹⁹ General Retail Industry Award 2010, cl 27

²⁰ Manufacturing and Associated Industries and Occupations Award 2010, cl 36

These amendments undermine a number of safeguards that were designed to address significant problems associated with Australian Workplace Agreements (**AWAs**) made under the *Workplace Relations Act 1996* (**WR Act**) and which ensured that IFAs could not be used by employers to exploit vulnerable employees or drive down wages or conditions of employment.

In order to properly understand the consequences of the proposed amendments to the Act, it is necessary to briefly revisit the operation of AWAs and the effect that these arrangements had on terms and conditions of employment during the Workchoices era.

Individual Bargaining under WorkChoices

Individual statutory contracts, known as AWAs, were first introduced by the WR Act.

AWAs operated to the exclusion of the relevant award or enterprise agreement and, following the implementation of WorkChoices, could apply for a period of up to 5 years.

The no disadvantage test, which ensured that AWAs did not on balance disadvantage an employee compared to the relevant award, was abolished under WorkChoices and replaced with five minimum standards known as the Australian Fair Pay and Classification Standard (**AFPCS**). These five standards were: a minimum hourly rate, 4 weeks' annual leave per year (2 weeks of which could be 'cashed out'), 10 days sick/carer's leave, a 38 hour working week (which could be averaged over a 12 month period in order to avoid payment of overtime rates for additional hours worked); and 52 weeks' unpaid parental leave. Other award entitlements were no longer 'protected' by law. Consequently an AWA could be made that stripped away basic award conditions, such as penalty and overtime rates, allowances and consultation rights.

The absence of unfair dismissal protections for workers of businesses with less than 100 employees and the introduction of 'operational reasons' as an insurmountable ground for dismissal enabled businesses to dismiss employees that refused to accept an AWA and replace them with employees on lower wages and conditions.

Workers could be compelled to accept an AWA that removed entitlements as a condition of employment or promotion. There was clearly no real choice on the part of an employee seeking a job whether or not to accept an AWA. The existence of a collective agreement under these arrangements offered very little protection against coercion or undue pressure being applied to individual employees to accept an AWA. WorkChoices permitted employers to undercut bargained entitlements by systematically implementing AWAs with individual employees.

The rhetoric of 'individual' flexibility for workers was used to promote AWAs however, in practice, AWAs provided employers with an extremely effective means of avoiding their legal obligations, undermining the safety net and exploiting vulnerable employees.

At the end of December 2007, the Workplace Authority estimated that around 880,000 employees (9.6 per cent) were on AWAs.²¹ The majority of AWAs were made with employees in low paid sectors of the economy. The retail, hospitality and personal services sectors accounted for 55% of all AWAs lodged.²²

Analysis of a sample of 250 AWAs (out of 6263 lodged between 27 March and 30 April 2006) shows that all AWAs removed at least one protected award condition and 16 per cent excluded all protected award conditions.²³

Further data compiled by the Workplace Authority shows that 89 per cent of the 1,748 AWAs lodged between April and September 2006 removed at least one protected award condition, 71 per cent excluded four or more, 52 per cent excluded six or more and 2 per cent excluded all protected award conditions. The protected conditions that were removed by AWAs included:

- penalty rates (65%);
- annual leave loading (68%);
- shift work loadings (70%);
- overtime loadings (49%);
- State/Territory public holidays (25%);
- days off work as a substitute for working on a public holiday (61%);
- public holiday penalties (50%);
- rest breaks (31%);
- allowances (56%); and
- bonuses (63%).²⁴

The rate at which conditions were being removed was substantially higher under WorkChoices AWAs than under pre-Work Choices AWAs and overtime and penalty rates were particular targets for

²¹ Lodgement Data cited in the Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

²² Workplace Authority, 'Lodgement Data: 27 March 2006–30 September 2007' (2007) p5.

²³ Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

²⁴ The Hon Julia Gillard MP, AWA Data the Liberals claimed never existed, media release, 20 February 2008. Note that the media release relied upon Office of the Employment Advocate data examined between April and October 2006.

removal. In the case of overtime pay, the rate at which this was removed through AWAs doubled from a quarter of AWAs in 2002-03 to over a half of AWAs in 2006.²⁵

Employers commonly used AWAs to increase hours of work. The average AWA employee worked a 13% longer week than their peers employed under collective arrangement.²⁶ Often employees on AWAs worked longer hours for less pay. For example in New South Wales, female AWA employees worked 4.4% longer hours than their counterparts engaged under collective agreements, but earned 11.2% less.²⁷

It was also common practice not to provide any wage increase over the life of the AWA. 22 per cent of AWAs in April 2006 contained no provision for a wage increase during the life of the agreement and this figure rose to 34 per cent in April-September 2006.²⁸

In industries, where award wages were not a good reflection of market wages, the wage loss suffered by a typical worker can be inferred by comparing AWA wages to the wages payable to workers employed under collective agreements. In 2006, the median AWA worker earned 16.3% less per hour than the comparable worker on a collective agreement.²⁹

In award-dependent industries, the removal of minimum conditions resulted in average wage outcomes for some workers that were even lower than the minimum award rate. For example, in the hospitality industry, average AWA earnings in 2004 and 2006 were 1.8 and 1.6 per cent below average earnings of workers reliant on the award minimum respectively.³⁰

Employees most negatively affected by AWAs included women, low-skilled workers, employees in small firms and workers with little bargaining power. Women on AWAs earned less than women on collective agreements in every state, by margins ranging from 8 to 30 per cent³¹ and female casual workers on AWAs received average earnings some 7.5% below average award earnings.³²

The experience of AWAs clearly demonstrates that the assumption of a level playing field where employees negotiate wages and conditions with their employers is a myth. Employees face a significant power imbalance that affects all aspects of the employment relationship. They were, and

²⁵ David Peetz and Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data' (2007) p 4.

²⁶ ABS cat 6306.0 (May 2006) p 33.

²⁷ ABS cat 6306.0 (May 2006) Table 10.

²⁸ David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 64.

²⁹ Peetz and Preston, p 13.

³⁰ David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 67.

³¹ Ibid, p 29.

³² Ibid, p 67.

are, likely to be unaware of their rights in relation to individual statutory contracts especially their right to refuse to make an agreement, and are not always well placed to make an assessment of whether an arrangement disadvantages them.

Employees are generally reluctant to challenge their employer, either by opposing the making of an agreement at the employer's insistence, or else in seeking compensation for disadvantage suffered under the terms of an agreement. Unless an employee is supported by a union, has skills which are in demand or is an unusually confident and assertive individual, it is unlikely that an employee would have been able to negotiate fair terms and conditions of employment.

On the other hand, it is overwhelmingly employers who initiate the use of individual statutory agreements. Employers seek agreements that provide them with increased discretion to set the terms and conditions of work. They commonly provide inadequate compensation for the removal of monetary entitlements particularly where there is no external assessment of the sufficiency of the compensation, and generally offer no compensation for non-monetary disadvantage suffered by the employee such as the employee's increased subjection to the exercise of managerial discretion. Employers will apply pressure to employees to accept their preferred agreement especially if they are permitted to make 'take it or leave it' offers to new employees, and some employers may apply pressure amounting to coercion even though this would be unlawful.

Non-compliance with employment obligations and lack of enforcement by employees is particularly prevalent in industries where the employer is under competitive pressure to reduce labour costs such as parts of manufacturing, hospitality and retail and particularly in the case of vulnerable workers including young workers, women, those working in precarious employment, outworkers and employees working in workplaces without a union presence.

Individual Bargaining under the Act

When the Act was introduced, a number of important safeguards on the operation of IFAs were included. The Act requires that IFAs:

- must be genuinely agreed to by both parties;³³
- must result in the employee being better off overall than they would have been had no agreement been made;³⁴
- can only be made after the employee has commenced employment;³⁵

³³ s144(4)(b), 203(3)

³⁴ s144(4)(c), 203(4)

³⁵ s144(4)(d), Modern award clause 7.2

- must be in writing and be signed by the employee and the employer. If the employee is under 18, the IFA must also be signed by a parent or guardian. The employer must ensure that a copy of the IFA is given to the employee;³⁶
- may be terminated by either party giving written notice or immediately if the parties agree.³⁷

The content of an IFA must also comply with the flexibility term contained in relevant modern award or enterprise agreement. The model flexibility term contained in all modern awards limits the award provisions that can be varied by an IFA to the following matters: arrangements about when work is performed; overtime rates; penalty rates; allowances and leave loading.³⁸

The terms that may be included in an IFA varying the effect of an enterprise agreement is a matter for bargaining. The Act requires all agreements to contain a flexibility clause that sets out which matters may be the subject of an IFA.³⁹ If the enterprise agreement does not include a flexibility term, the model flexibility term in the Fair Work Regulations is taken to be a term of the agreement.⁴⁰ The model agreement flexibility term contains the same matters as model award flexibility term.

Unions did not support the introduction of IFAs, notwithstanding the formal safeguards that accompanied them. Since that time, it has become apparent that in spite of these safeguards IFAs are being used by employers in a similar fashion to AWAs – that is, to drive down wages and conditions and exploit vulnerable employees.

The most comprehensive source of data on IFAs to date is the report of the General Manager of Fair Work Australia, as the Commission was then known, published in November 2012.⁴¹ The report contains an analysis of the extent to which IFAs are agreed to and the content of those arrangements. Sources used to inform the report include:

- a survey of 2650 employers across a range of locations, employer sizes and industries;
- a survey of 4500 employees from across Australia, sources from a range of industries;
- qualitative analysis of individual IFAs submitted to the general manager by employers; and

³⁶ s144(4)(e), 203(7)

³⁷ s144(4)(d), 203(6)

³⁸ Modern award clause 7.2

³⁹ 203(2)(a)

⁴⁰ 203(4),203(5)

⁴¹ General Manager's Report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012, (2012).

- submissions from interested parties.

The responses provided by survey participants confirm that employers are generally better informed than employees about the provisions of the Act with respect to agreement making and are well placed to control the agreement making process.

- 54 per cent of all employers are 'aware that employers can have an IFA with an employee that varies the effect of the modern award or an enterprise agreement that applies to an employee' compared with 35 per cent of employees.⁴²
- Employers reported that most reviews, modifications and terminations of IFAs were employer-initiated (around 70 per cent).⁴³
- The drafting process is largely controlled by employers. 85-88 per cent of employers are involved in drafting the content of IFAs compared with approximately 36-38 per cent of employees.⁴⁴ Multiple IFA employers also commonly receive assistance from employer associations and external consultants, particularly in relation to IFAs that vary the effect of a modern award.⁴⁵

More significantly, the research reveals that IFAs are being used in a manner that is expressly prohibited by the Act.

The majority of multiple IFA employers (54 per cent) admitted that they required all employees to sign IFA documentation to either commence or continue their employment.⁴⁶ For employers that had made an IFA with only one employee, around 35 per cent indicated they had required an employee to sign the IFA to commence or continue employment.⁴⁷ Such conduct is inconsistent with the requirement that the employer and individual employee must have 'genuinely agreed' to make the IFA, without coercion or duress.

Participants in the employer survey were asked if they had assessed whether their employees were better off overall as a result of their IFA. The results show that a significant proportion of employers made no effort to comply with their legal obligations under the Act. 18 per cent of single IFA employers

⁴² Figure 4.1, Table 4.1.

⁴³ Table 4.4, Table 4.7

⁴⁴ Table 4.3, Table 4.6

⁴⁵ Table 4.6

⁴⁶ Table 4.6

⁴⁷ Table 4.3

and 27 per cent of multi-IFA employers reported that they did not assess whether the employee was better off overall.⁴⁸

Participants in the employee survey were asked whether they considered themselves to be better off overall as a result of the IFA. Not surprisingly, a significant proportion (17%) reported that they did not consider themselves to be better off overall.⁴⁹

These findings highlight the fact that existing safeguards of the use of IFAs are relatively ineffectual as a means of protecting employees. The absence of external scrutiny in relation to the process of making and the content of IFAs enables employers to pressure employees to accept substandard IFAs that reduce wages and conditions.

The ACTU believes that the findings contained in the report tend to understate the extent to which IFAs are being utilised to exploit employees. For obvious reasons, employers that are aware of their legal obligations may be inclined to disguise non-compliance. On the other hand, it is likely that a significant number of employees surveyed may be unaware that an IFA removes entitlements contained in a modern award or enterprise agreement. A further edition of the research report was due to be provided to the Minister on 30 November of this year, although at the time of writing it had not been publicly released.

Since the Act was enacted, the ACTU and its affiliates have had numerous reports of IFAs that clearly disadvantage employees compared to the relevant award or enterprise agreement.

For example in 2011, United Voice sued the Spotless Group over two suspect IFAs. Under one of the arrangements, employees agreed that if other workers were absent on sick leave, Spotless could contact them and direct them to work the shift, waiving their rights to the usual 7 days' notice and overtime rates of pay. They received no compensation, except 'the opportunity to earn a higher income'. The matter was settled and the union is party to a Deed of Release that prohibits discussion of the substance of the Deed or the circumstances surrounding the settlement. Nevertheless, the statement of claim outlining the allegations against Spotless is a matter of public record and provides evidence of the kinds of IFAs that exist.

Another specific example of which the ACTU is aware relates to offers made by Medibank Private to its employees to work from home on the condition that the employee agrees to forgo the entitlement to overtime rates under the terms of the relevant collective agreement.

In our submission such arrangements clearly do not pass the Better Off Overall Test (**BOOT**). Yet employer organisations frequently assert that non-monetary entitlements such as arrangements that

⁴⁸ Table 5.5, Table 5.7

⁴⁹ p 71

provide 'the opportunity to earn extra income' or that otherwise 'meet employee needs' can be used to offset the loss of financial entitlements such as penalties and loadings.

Anecdotal evidence suggests that the use of IFAs to remove award entitlements is prevalent in low-paid industries such as the cleaning, aged care, and disability sectors. The ACTU understand that in these industries IFAs are commonly used to alter penalty rates, overtime and allowances or modify award provisions that regulate hours of work, for example by removing minimum engagement provisions or increasing the maximum number of days that an employee can work consecutively without payment of overtime.⁵⁰

There have also been a number of high profile cases which demonstrate that unfair practices persist. An audit conducted by the Fair Work Ombudsman in 2011 to assess the level of award compliance in the Queensland Pharmacy Industry confirmed the use of what appeared to be a 'standardised' or template-driven IFAs being used by a small number of employers. As the report notes, the template approach raises questions as to whether the IFAs were produced following genuine negotiation.⁵¹ Moreover, such an approach does not demonstrate appetite by the employer for flexibility, but rather a preference for all employees to be on identical conditions of employment chosen by the employer.

Further, the ACTU notes that there has been at least one prosecution under the general protections provisions of the Act that involved an IFA. The general protections provisions of the Act prohibit employers exerting undue influence or undue pressure on an employee in relation to a decision to make or terminate an IFA. Civil penalty provisions also apply to employers that coerce an employee to exercise a workplace right in a particular way or take adverse action against an employee because of a workplace right.

In *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd*,⁵² six employees were asked to sign IFAs that removed penalty rates for overtime, weekend and public holiday work. Five of the six employees signed the agreement. One of the employees signed only after the director threatened that there would be no work for him if he did not sign. Another employee had his shifts cut following his refusal to sign. The company also admitted that the information provided to employees failed to comply with s 45 of the Act. The court fined the operators of the company a total of \$30 000.

While the penalties awarded in this case may have discouraged some employers from using heavy-handed tactics to persuade employees to accept an IFA, the ACTU remains concerned about the risk of coercion in non-unionised, award-dependent workplaces particularly with respect to vulnerable workers.

⁵⁰ These observations are based on an analysis of IFAs compiled by United Voice

⁵¹ Fair Work Ombudsman, 'Qld - Pharmacy Industry Audit Program Report 2011', (2012) 11

⁵² [2011]FCA 1064

Sophisticated employers that wish to avoid their legal obligations are likely to avoid using template agreements and apply pressure in more subtle ways for example by treating employees that refuse an IFA less favourably or informing other employees that the refusal is causing financial difficulties for the business.

The process by which agreement is reached is generally not subject to external scrutiny and consequently all but the most egregious breaches are likely to remain undetected.

The Proposed Amendments

The existing issues identified with the abuse and manipulation of IFAs will only be exacerbated by the changes proposed in the Bill. Not only will abuse and manipulation increase, it will remain undetected and unable to be acted upon should the Bill be passed.

The Bill contains a number of significant changes to the provisions governing IFAs. In summary the Bill:

- requires flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of IFAs with 13 weeks' notice;
- requires flexibility terms in enterprise agreements to provide, as a minimum, that IFAs may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading;
- "clarifies" that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employee is better off overall under an IFA;
- requires IFAs to include a statement by the employee setting out why he or she believes that the arrangement meets his or her genuine needs and leaves him or her better off overall at the time of agreement to the arrangement;
- provides a defence to an alleged contravention of a flexibility term where the employer reasonably believed that the requirements of the term were complied with at the time of agreeing to a particular IFA.

The proposed amendments contained in the Bill with respect to IFAs undermine existing protections for employees. If accepted, these amendments will enable employers to make agreements that bear a remarkable resemblance to AWAs and have very similar consequences for employees.

We also note that the Coalition’s policy provided that workers “can ask for fair and protected flexible working arrangements if they want” or “if they ask for one”.⁵³ The Bill evinces nothing to this effect.

The consequence for employees of each of the proposed amendments is discussed further below.

Unilateral Termination with 13 weeks’ notice

The unilateral termination period for IFAs made under awards is currently set by the model clause in awards. Currently, the minimum unilateral termination period set by the Commission is 13 weeks. For agreements, the minimum unilateral termination period set by the Act is 28 days.

The Bill requires flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of IFAs with 13 weeks’ notice.

Unilateral termination is an important safeguard that helps to prevent abuse of IFAs. IFAs are intended to be mutually beneficial for both parties. If an IFA is no longer meeting this objective, the parties to it should be able to terminate the arrangement. This is particularly important given that the process by which agreement is reached and the content of any such agreements are generally not subject to external scrutiny.

The notice period which applied to both kinds of IFAs was originally set at 28 days. The notice period contained in the model flexibility clause in modern awards was altered by the Commission in 2012 in response to concerns raised by employers that the capacity for an employee to unilaterally terminate an IFA with 28 days’ notice limits the certainty of agreements and operates as a disincentive to use IFAs.⁵⁴

However, there is little evidence to support the contention that the four weeks’ notice period acts as a disincentive for employers to enter into IFAs.⁵⁵ The General Manager’s Report on IFAs found that less than one per cent of employers surveyed who were aware of, but did not make an IFA, cited the four weeks’ notice period as the reason why they had not entered into an IFA. The most common reason, reported by just over half of employers, was that there had been no identified need to enter into an IFA.⁵⁶

⁵³ The Coalition’s Policy to Improve the Fair Work Laws, May 2013, pp 7 and 27

⁵⁴ See Modern Awards Review 2012 - Award Flexibility Decision, [2013] FWCFB 2170.

⁵⁵ [2013] FWCFB 2170, [171]

⁵⁶ Table 4.2

Moreover, as the Commission noted, the certainty afforded to both parties by a longer notice period must be weighed against other matters including the need to protect employees who through ignorance or for some other reason make an agreement that which materially disadvantages them and ensure that unforeseen developments that render a flexibility agreement not only unacceptable to one of the parties but also substantially unfair can be addressed.⁵⁷

The operation of a lengthy notice period has significant consequences for employees that are financially worse off under the terms of an IFA than under the relevant modern award or enterprise instrument. In circumstances where the agreement was not genuinely agreed to or fails to meet the BOOT the employer continues to reap the benefits of having made an unlawful agreement for several months after the employee becomes aware they are being disadvantaged.

For these reasons the ACTU is strongly opposed to any extension to the notice period for unilateral termination.

Genuine Needs Statement and Employer Defence

The Bill modifies the flexibility term in both awards and agreements by inserting a requirement for a genuine needs statement.

A “genuine needs statement” is effectively a testimonial from the worker. It is a statement: “setting out why the employee believes (at the time of agreeing to the IFA) that the IFA:

- meets the genuine needs of the employee; and
- results in the employee being better off overall than the employee would have been if not IFA were agreed to”.⁵⁸

The Bill mandates that the flexibility term of an award or an agreement must require that any IFA entered into includes a genuine needs statement.

The creation of a “genuine needs” statement works in tandem with a defence provision which will apply in relation to IFAs entered into in relation to awards and agreements. The defence provides that an employer does not contravene a flexibility term in relation to an IFA if, at the time when the IFA was made, the employer reasonably believed the requirements of the flexibility term were complied with.⁵⁹ The genuine needs statement is clearly a defence mechanism for an employer which ensures that an employer has no obligation to ensure that an employee entering into an IFA has given informed consent to this course of action. There is no protection offered to an employee through the

⁵⁷ [2013] FWCFB 2170, [175]

⁵⁸ Fair Work Amendment Bill 2014, Item 14

⁵⁹ Fair Work Amendment Bill 2014, Item 204A

genuine needs statement, rather the genuine needs statement has the opposite effect, denying an employee the ability to assert that they were not fully informed of what they were agreeing to.

The genuine needs statement fails to include any mechanism to quantify the entitlements an employee may be giving up and it does not include any safeguards which would ensure that an employee understands the monetary value of what they are trading off when they sign up to an IFA. The failure to include such provisions is akin to an employee signing a contract of employment where the consideration the employee gives is not identified or quantified in any way. It is unjust and unconscionable for an employer, a party in both a superior bargaining and industrial knowledge position to an employee, to be able to seek an employee's agreement to something the effect of which the employee may not fully comprehend. Putting the onus on an employee to determine that they are genuinely better off is absurd.

Curiously, the Bill does not deal with situations where no genuine needs statement has been created. Any failure to obtain a genuine needs statement is not dealt with. Currently, if an IFA is defective, the IFA remains on foot (until withdrawn from) but the Act deems that the flexibility term has been contravened.⁶⁰ Prosecutions for breach of the flexibility clause can result in penalties being awarded against the employer and compensation being paid to workers, where the IFA did not in fact result in the worker being "better off overall".⁶¹

Because each IFA will now include a testimonial from the worker about how it meets their needs and leaves them better off overall, employers are likely to rely on that testimonial to demonstrate their "reasonable belief" for the purposes of the defence. A successful defence will result in no exposure to a penalty, and no requirement to remedy any underpayment.

The ACTU submits that these amendments are likely to completely undermine the protection afforded to employees by the BOOT and the requirement that an IFA be genuinely made.

Employees that are compelled, either through ignorance or undue pressure, to accept an IFA that reduces their terms and conditions of employment, will have no recourse under the law to recover payments lost as a result of entering into the IFA.

In other words, not only does the employer stand to benefit from an unfair IFA while it is in operation (including during the lengthy period of notice required for unilateral termination), but does so in perpetuity.

⁶⁰ s145(2)(3)

⁶¹ See Part 4-1 of the Act

Moreover the fact that employers will be able to knowingly breach the provisions of the Act with impunity provides a significant financial incentive to exploit employees.

The requirement for a “genuine needs statement” was never identified in the Coalition policy and serves only to bolster an employer’s defence to a prosecution. Whilst the defence was identified in the Coalition policy by reference to a recommendation of the Panel, that recommendation stated that the defence should only be available where the employer had notified the Fair Work Ombudsman of the making of the IFA.

If the recommendation were implemented in full, employers would be much more cautious about seeking an IFA that undermines terms and conditions of employment. It is also more likely that the defence would only be used by employers that genuinely believe they had complied with the requirements contained in the Act.

The Better Off Overall Test

In relation to the BOOT for IFAs, it is proposed to insert a Note providing that “Benefits other than an entitlement to a payment of money may be taken into account” for the purposes of that test.

The ACTU is strongly opposed to non-monetary entitlements being used to offset the BOOT. The BOOT is a fundamental safeguard that ensures employees have access to genuine flexibility without having to accept a reduction in wages and conditions.

The current legal authorities support the proposition that a purported IFA which contains a preferred hours arrangement (enabling an employee to trade off monetary benefits such as penalties and overtime in exchange for the flexibility to work their “preferred” hours) does not result in an individual employee being better off overall.⁶² The proposed amendments are clearly intended to alter this position.

Unfair arrangements that have been the subject of successful prosecutions or out-of-court settlements under the existing provisions of the Act such as the substandard IFAs offered to Spotlight employees would become permissible.

Other examples of IFAs that are lawful under the proposed amendments include those that:

- enable employees to work from home in exchange for a reduced rate of pay;
- enable employees to vary their start and finish times if they agree to forgo overtime payments;

⁶² [2013] FWCFB 2170, [136]

- enable employees to take annual leave in advance if they forgo their annual leave and shift loadings;
- provide employees with access to a car park or meal voucher in exchange for the suspension of applicable allowances; and
- provide part-time employees with a guaranteed number of hours per week in exchange for the suspension of minimum daily engagement provisions.

The ACTU notes that the safeguards identified in the Panel’s recommendation that IFAs “be amended to expressly permit an individual flexibility agreement to confer a non-monetary benefit on an employee and exchange for a monetary benefit, provided that the value of the monetary entitlement forgone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate” have not been included in the proposed amendment.⁶³

Consequently, there is no limitation on the monetary entitlements that an employee may be compelled to forgo in order to gain access to much needed flexibility. Employers that can easily accommodate a modest request for flexible working arrangements without incurring any additional costs will be able to use their superior bargaining position to insist on the removal of significant monetary entitlements under the terms of an IFA.

The Bill effectively empowers employers to offer employees hours which are available, rather than hours which an employee would prefer (with reduced or removed penalties). There is a chasm of difference between the hours and employee would prefer and those that an employer will make available to the employee.

Matters that may be subject to an IFA

Finally, the Bill proposes that the flexibility term in agreements cover (at a minimum) arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading.

The current legislation allows the content of flexibility terms in enterprise agreements to be narrower in scope than the model flexibility term. The EM states that this “means that employees covered by an enterprise agreement may be denied the opportunity for more suitable workplace arrangements even if their employer agrees”.⁶⁴

This statement is misleading. There is nothing to prevent employers providing individual employees with access to additional flexibilities either through an informal arrangement or common law contract

⁶³ Recommendation 9, Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation.

⁶⁴ Explanatory Memorandum, p xxix

provided that the arrangement does not undermine the terms and conditions contained in the relevant enterprise agreement or modern award.

The key difference between these arrangements and IFAs is that the operation of the BOOT enables IFAs to include terms that are less beneficial provided that the employee is better off overall whereas common law contracts must not derogate in any respect from specific entitlements contained in a modern award or enterprise agreement.

Employees and unions engaged in bargaining commonly seek to restrict the matters that may be subject to an IFA, not because they wish to restrict individual flexibility, but in order to prevent employers targeting vulnerable employees and utilising IFAs to undermine collective conditions.

The effect of the proposed amendment is to restrict the capacity of parties to an agreement to freely negotiate the terms of that agreement and enable employers to systematically undercut beneficial provisions that were agreed to bargaining. The parties to an agreement have, through a process of bargaining and negotiation, agreed on an appropriate level of flexibility for the enterprise. In some cases this would mean that the flexibility clause is narrow in scope. This is entirely appropriate and the parties' ability to reach a mutual agreement on the scope of the flexibility clause should not be curtailed through the changes proposed in the Bill.

Part 4 – Transfer of business

The Bill proposes an exclusion for what constitutes a transfer of business, in relation to national system employers and in relation to the expanded operation with respect to State Public Sector employers.

The exclusion would apply where both of the following apply:

- the new employer is an associated entity of the old employer when the employee becomes employed by the new employer; and
- before the termination of the employee's employment with the old employer, the employee sought to become employed by the new employer at the employee's initiative.

This is a response to the Panel's Recommendation 38⁶⁵ that the Coalition committed to implement.⁶⁶ It should be noted that the only employer to raise specific concerns to the Review in relation to this

⁶⁵ Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 206.

⁶⁶ The Coalition's Policy to Improve the Fair Work Laws, May 2013, p 37

aspect of the transfer of business provisions was Qantas.⁶⁷ On the face of this proposal it appears that it is designed to allow Qantas to restructure its operations so that employees are forced into jobs which offer lower wages and conditions. As with the greenfields agreement proposals, this is another example of the Bill catering to the narrow grievances and interests of particular employers.

The amendment would take effect from the day after Royal Assent, in relation to employees commencing employment with a “new employer” after that date.

The ACTU does not support this proposal. We submit that this proposal is open to exploitation. An employer may restructure their operations with the sole purpose of avoiding their obligations under industrial instruments, and few employees would choose “no job” when their only other alternative was to keep their job on reduced conditions.

In some cases it may be true that an employee chooses to transfer their employment to a related entity of their current employer. In *Sunstate Airlines (Qld) Pty Ltd*⁶⁸ weight was given to the fact that the employee applied for the new position on his own initiative and on the basis that the advertised terms and conditions of employment were acceptable to him. In such cases, where no duress has been applied to the employee because they have sought the new employment of their own volition, the result may be appropriate – and indeed that result was facilitated by the existing transfer of business provisions.

However, we submit that in many cases an employee will have no choice but to move to an associated entity of their current employer, for example when they are faced with the prospect of not having a job, as set out above, or for example when their current employer exerts some duress or coerces the employee to seek the transfer.

The employment relationship is inherently unbalanced. An employer, or a potential employer, holds a position of power over an employee. This means that it is essential to ensure that the power imbalance does not work to disadvantage employees. The means by which the power imbalance is kept in check is Part 2-8 of the Act.

The risk to employees is too great to justify the removal of the current protections found in the Act. The requirement to make an application under s 318 is not so administratively onerous as to justify the removal of the existing protections. An application under s 318 can be made by the transferring employee, or the new employer, or a union.

⁶⁷ Report of the Fair Work Act Review Panel, “Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation”, 2012, pp 205-207.

⁶⁸ [2011] FWA 4905

It is vital that the views of the transferring employee are taken into account.⁶⁹ A determination of whether an employee has sought a transfer of their own free will should be determined by the Commission, as is currently the case. It should not be determined based on paperwork completed by the parties, or an assertion made by an employer. It is necessary to examine the extent to which an employee has exercised their own choice free of any influence on the part of their employer or new employer.

Part 5 - Right of Entry

The amendments proposed in Part 8 of the Bill are derived from right of entry provisions which existed under WorkChoices and repeal recent amendments to the legislative framework that ensure union officials with entry permits are able to access workplaces to hold discussions with employees.

The objects of Part 3-4 of the Act as they currently indicate an intention to balance between competing considerations.⁷⁰ The existing provisions in the Act achieve that balance. The Bill proposes to disturb that balance, and will unfairly restrict the access of workers to their unions at work. Aspects of the proposed Bill remove any utility and efficacy the right of entry system may have in facilitating representation at work.

WorkChoices significantly restricted the rights of employees to be represented in the workplace by limiting the circumstances in which right of entry could be exercised. As the Panel notes there were two main problems that the Act sought to address:

First was the requirement that to exercise a right of entry for discussion purposes, a union was required to be bound by an applicable industrial instrument. This had the effect of preventing union members and eligible employees in a workplace from being represented by their union.

Second, allowing an employer to determine the location at the workplace where union members and employees eligible to be a member of a union could meet their union representatives, unless the location was unreasonable, lead to employees being required to meet their representatives in inappropriate locations, such as a toilet block.⁷¹

The amendments to the right of entry scheme guarantee that such problems will re-emerge.

⁶⁹ S 318(3)(a)(ii)

⁷⁰ See also ss 3(e) and 6(5) of the Act

⁷¹ Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 189

New Conditions of Entry for discussion purposes

The Bill provides new eligibility criteria that determine when a permit holder may enter premises for the purpose of holding discussions or conducting interviews with employees.

The new conditions of entry for discussion purposes are:

- where an enterprise agreement applies to work performed on the premises, and the permit holder's organisation is covered by that agreement;
- where an enterprise agreement applies to work performed on the premises, but it does not cover the permit holder's organisation, but only if a member or prospective member has invited the union; and
- where no enterprise agreement applies to work performed on the premises, but only if a member or prospective member has invited the union.⁷²

The current provisions of the Act enable a union official to enter a workplace to hold discussions with employees who perform work on the premise, whose industrial interests the permit holder is entitled to represent and who wish to participate in those discussions.⁷³

The key difference between the existing provisions and the right of entry scheme that operated under WorkChoices is that entry rights are tied to whether the relevant union is entitled under their eligibility rules to represent employees at the workplace. In practice, the Act requires employers who were previously able to exclude many, or all, unions from their workplace on the basis of applicable industrial instruments, to facilitate a relevant union accessing the employees at the workplace.

The provisions contained in the Bill concerning right of entry are similar to WorkChoices. The effect of these amendments is that unless the union is already covered by an enterprise agreement that applies to work performed on the premises, employees will be required to take positive steps to enable the union to attend a workplace.

Contrary to the very clear commitment given by the Coalition, there is no explicit right of entry (conditional or otherwise) given where a union is a bargaining representative seeking in good faith to make an agreement to apply in that workplace.⁷⁴

There has been some attempt to ameliorate the very obvious difficulty of proving a member or prospective member has invited the union on site, which is the "Invitation Certificate" procedure. This

⁷² Item 61

⁷³ s484

⁷⁴ The Coalition's Policy to Improve the Fair Work Laws, May 2013, p 17

will enable the union to obtain a certificate from the Commission to the effect that the Commission is satisfied that there is a member or prospective member that the union is entitled to represent who has invited the union to send a representative on site for the purposes of holding discussions. Such certificates, however, will have expiry dates which will be constrained by as yet unpublished regulations. Notably, no provision of the Bill actually requires that an employer or occupier take notice of an Invitation Certificate.

The new provisions clearly limit the capacity of vulnerable workers to access their union. Employees are unlikely to be aware of the legislative requirements concerning right of entry and may not know which union is eligible to represent their interests. Fear of retribution from their employer will also deter many employees from issuing an invitation to the relevant union. While the amendments require that an invitation certificate must not reveal the identity of the member or prospective member to whom it relates, it is likely that employees will be intimidated by the prospect of having to go through a formal process in order to invite a union onto the workplace. Employers that wish to do so will be able to limit the capacity of employees to access the union by simply ignoring the existence of an Invitation Certificate.

New Dispute Resolution Provisions

The Bill amends s 505A of the Act which enables the Commission to deal with a dispute concerning the frequency of entry by a permit holder to a workplace under s 484 for the purpose of hold discussions with employees.

The amendment to s 505A(4) replaces the current threshold question that prevents the Commission from making an order in respect of frequent entry unless the Commission "...is satisfied that the frequency of entry by the permit holder or permit holders of the organisation would require an unreasonable diversion of the occupier's critical resources" with a new provision that will require the Commission to consider the combined impact on "operations" of entries by any organisations, including those who are not party to the dispute.

The existing provisions were implemented in response to a recommendation of the Panel that the Act "be amended to provide FWA with great power to resolve disputes about the frequency of visits to a workplace by a permit holder in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience."⁷⁵

The ACTU did not support the implementation of these provisions. In our submissions to the House Standing Committee on Education and Employment concerning the Fair Work Amendment Bill 2013,

⁷⁵ Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, Recommendation 35, p 195.

we respectfully disagreed with the Panel that any additional amendments to the Act were necessary in order for the Commission to adequately deal with disputes concerning excessive entries. We also argued that to the extent that there was any evidence of entry rights being exercised “too frequently” this was in large measure a function of the protocols adopted by employers, occupiers and project managers on large worksites. Such protocols effectively required the permit holders to treat a worksite as comprising a multitude of premises (depending on their physical location on the site and which contractor or sub-contract was engaged there) and make separate entries (sometimes more than one on the same day) in order to exercise their rights under the Act.

Whilst maintaining that specific provisions concerning too frequent entry are unwarranted, we submit that the s 505A provides an adequate mechanism of dealing with excessive visits to a particular workplace, should this occur. The ACTU is not aware of any cases under the existing provisions and in our submission, there is simply no evidence to suggest that further amendments are required to address employer concerns.

We note that the Act contains a number other mechanisms that that could be used to address the issue of excessive visits, should the need arise. These include the broad powers of the Commission to take action against a permit holder (by suspending, revoking or impose conditions on an entry permit) or make any order it considers appropriate to restrict entry rights if satisfied that the official or organisation has misused those rights.⁷⁶

Permit holders are not necessarily in a position to know about or regulate the conduct of other permit holders.

The effect of the proposed amendments requiring the Commission to consider the combined impact of entries by any organisations, including those who are not party to the dispute is that all unions will be locked out of a site if one union is found to have entered too frequently.

It is also possible that access to a worksite may be restricted in circumstances where the total number of visits may be regarded as excessive from the employer’s point of view even though the number of visits conducted by each permit holder is entirely reasonable and may be necessary in order to ensure that employees have access to a union that is entitled to represent their interests.

Location of interviews and discussions

The Bill repeals recent amendments concerning the location of interview or discussions which occur pursuant to the rights contained in Division 2 of Part 3-5. Under the WR Act prior to WorkChoices the effective default position was that a union had the right to hold discussions with employees where

⁷⁶ s507, s508

employees congregated on their breaks (most usually where they take their meals).⁷⁷ The 2012 amendments to the Act reflect the long standing and largely uncontentious position under the previous legislation.

The rights affected include the right to hold discussions with employees during meal times or other breaks (Subdivision B) and the right to conduct interviews at any time during working hours pursuant to a right to investigate a suspected contravention (Subdivision A and AA).

S 492 of the Act currently requires a permit holder to conduct discussions in the rooms or areas agreed with the occupier of the premises.⁷⁸ If the permit holder and the occupier are unable to agree, the permit holder is entitled to hold discussions in any room or areas in which employees ordinarily take meals or other breaks and is provided by the occupier for that purpose.⁷⁹ S 492A requires the permit holder to comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area.

These provisions were inserted into the Act by the *Fair Work Amendment Act 2013* to ensure that permit holders are able to meet with union members and eligible employees in the most convenient location. The main meal or break room is generally the most accessible and practical location for permit holders to meet with employees.

The Bill repeals the current provisions and substitutes s 492 as it existed prior to the 2013 amendments. Under these provisions employers routinely frustrated opportunities for workers to meet with their union. In our submission to the Panel, we provided a number of examples of employer conduct designed to prevent workers having access to their union. These include:

- preventing the announcement of the arrival of the union official (or the employer's refusal to make such an announcement);
- directing the official to meet workers at some far-off place (which cannot be reached during the lunch break);
- staggering breaks so that there is never a time that all workers are on a common lunch break;
- directing the official to meet with workers in a room next to the manager's office, so that the employer can observe who attends; and

⁷⁷ S 285C Workplace Relations Act 1996. See cases such as *Textile Clothing and Footwear Union of Australia v Leading Synthetics* - 588/99 M Print R5518 [1999] AIRC 616 (3 June 1999) and *Construction, Forestry, Mining & Energy Union and another and McConnell Dowell Constructors (Aust) Pty Ltd* 1366/97 M Print P6606 [1997] AIRC 1107 (11 November 1997). See also Orders such as 077/96 M Print N0607 [1997] AIRC 1062 (3 November 1997)

⁷⁸ s492(1)

⁷⁹ s492(2)(3)

- directing the official to meet with workers in a room that has insufficient space in order to limit the number of employees that can attend.

The Panel accepted that the capacity for Commission to deal with the 'merits' of a dispute over the reasonableness of a meeting location was constrained by the provisions (as they existed prior to *Fair Work Amendment Act 2013*) which gave primacy to the right of the occupier to select the location of a meeting.⁸⁰

The Panel recommended that the relevant provisions be 'amended to provide the Commission with greater power to resolve disputes about the location for interviews and discussions in a way that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience'.⁸¹

The amendments contained in the Bill are inconsistent with the Panel's recommendation, will enable employers to reinstitute practices that make it difficult for permit holders to access an appropriate location for discussion purposes and effectively deny workers the opportunity to meet with their union.

Transport and Accommodation Requirements

In addition the Bill repeal amendments made by the *Fair Work Amendment Act 2013* that introduced new provisions concerning transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations.

In many locations transport and/or accommodation is only accessible if the occupier of the premises supplies it (on whatever terms it chooses). This is particularly an issue in the resources sector where "fly in fly out" workers are engaged.

The Act currently requires the occupier to supply the permit holder or his or her occupation with the necessary transport and/or accommodation in particular circumstances on a cost recovery basis.⁸² There are a number of conditions that must be satisfied before the obligation to provide accommodation arises:

⁸⁰ Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 197.

⁸¹ Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, Recommendation 36, p 197

⁸² s521C, s521D

- the premises to which the entry is sought is located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises causes it to be provided;
- to provide accommodation would not cause the occupier undue inconvenience;
- the request is made within a reasonable period before accommodation is required; and
- the permit holder and the organisation of which the permit holder is an official have been unable to enter into an accommodation arrangement with the occupier by consent.⁸³

Similar conditions apply to the obligation to provide transport.⁸⁴

The occupier is entitled to charge the permit holder a fee provided that the fee is no more than what is necessary to cover the cost to the occupier of providing such accommodation/transport.⁸⁵

These provisions enable employees at remote locations to have access to their union at the workplace, ensure permit holders behave in an appropriate manner and provide reasonable limits on the recovery of costs associated with the provision of transport and accommodation.

Removing the obligation on employers to facilitate accommodation and transport for permit holders will significantly disadvantage employees at remote locations by making it virtually impossible for them to participate in discussions with their union at work. The only circumstance in which such employees will be able to do so is where the employer voluntarily elects to facilitate the permit holder's entry rights.

Part 6 – FWC hearings and conferences

The Bill implements several recommendations contained in the Panel's report that relate to the capacity of Commission to dismiss unfair dismissal applications.

Currently the Commission is required by s 397 of the Act to hold either a conference or a hearing in an unfair dismissal matter where there is a factual dispute.

⁸³ s521C(1)(2)

⁸⁴ s521D(1)(2)

⁸⁵ s521C(3), s521D(3)

The effect of the proposed amendment would be to create an exception to s 397 for factual disputes over the grounds for summary dismissal of an application. This means if there is a factual dispute about whether:

- the application is not made in accordance with the Act;
- the application is frivolous or vexatious;
- the application has no reasonable prospects of success;
- the applicant unreasonably failed to attend a conference or hearing;
- the applicant unreasonably failed to comply with an order or direction; or
- the applicant unreasonably failed to discontinue the application after a settlement agreement had been reached

The Commission will be permitted to dismiss the application without holding a hearing or conference, provided that the Commission has invited the parties to provide information about whether the power should be exercised.

The summary dismissal powers in unfair dismissal matters exist to benefit employers. These amendments will facilitate such matters being determined on the papers.

During oral hearings and conferences, Tribunals generally try to ensure that unrepresented parties understand what is occurring. If an unrepresented applicant is unable to properly articulate in a written submission why the matter should not be dismissed, they will be disadvantaged by these provisions.



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