Fair Work Amendment Bill 2014
Senate Education and Employment Legislation Committee

Submission - Business SA

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BusinessSA
South Australia's Chamber of Commerce and Industry

Contents

Executive Summary

Business SA is pleased to have the opportunity to make submissions to the Senate Education and Employment Legislation Committee on the *Fair Work Amendment Bill 2014* (the Bill).This submission should be read in conjunction with Australian Chamber of Commerce and Industry's (ACCI) submission on the Bill.

Business SA broadly supports the introduction of the Bill to give effect to the Coalition's Industrial Relations Policy Platform, including implementing a number of recommendations of the Gillard/Rudd Government's Fair Work Act Review Panel (the Panel) that are still outstanding. In particular, we are pleased that the Bill contains sensible and practical amendments to the *Fair Work Act 2009* (the Act) in relation to:

- annual leave loading on termination;
- annual leave accrual while in receipt of workers' compensation payments;
- individual flexibility arrangements;
- greenfields agreements;
- right of entry; and
- protected action ballots.

These are important steps in the right direction and should restore some balance in the Act. However, Business SA submits that additional amendments are necessary in order to provide genuine workplace flexibility and further reduce the regulatory and administrative burden. Such additional amendments are detailed in Business SA's February 2012 and ACCI's February 2012 submissions on the Fair Work Act Review, which are available on Business SA's and ACCI's respective websites.

Furthermore, a limited number of amendments to the Bill are required to ensure that the legislation does not result in unnecessary increases to the regulatory burden on business, particularly where the additional regulation appears to address a theoretical problem, rather than a genuine issue of public policy.

Specific provisions of the Bill

Part 1 - Extension of period of unpaid parental leave

The Bill seeks to insert a new subsection 76(5A) requiring an employer to provide a reasonable opportunity for the employee to discuss their request for an extension of a period of unpaid parental leave. A similar recommendation was also provided by the Panel.

Business SA opposes this additional regulation, simply because there is nothing to demonstrate that there is any current problem with the existing Act. The basis for this additional regulation appears very weak and to be based on speculation rather objective data.

While parental leave was discussed at some length in the Panel's report, Business SA notes that the Panel did not refer to any statistics or indeed any specific submissions to demonstrate that the existing 76(5) is problematic and to justify its recommendation number 3. Unlike the Panel's other recommendations, for example in relation to requests for flexible working arrangements, it is unclear if any party requested for an amendment to section 76(5) or whether it simply originated from within the Panel.

Given this lack of data and any evidence to demonstrate the need for imposing a statutory requirement to engage in a discussion with the employee regarding requests for additional unpaid parental leave, it is not surprising the costs and benefits of this policy as outlined in the Regulatory Impact Statement (RIS) in the Explanatory Memorandum appear highly speculative and less than convincing. For example, in relation to the cost attached to status quo, the RIS on page xlii states that:

"Maintaining the status quo would not address the problem that some employees may be disgruntled about an employer's refusal and leave the workforce rather than return to work at a time when they are not ready to or because they feel that their employer has not duly considered their request for extended unpaid parental leave."

Business SA notes that there is no data or evidence in the RIS to support this claim. We are unaware of any reliable data showing that employees are resigning and leave the workforce because they feel that their requests for additional annual leave has not been properly considered. In advising South Australian employers on their legal obligations and best practice in relation to unpaid parental leave, Business SA has not evidenced any such situation where an employee has threatened to resign or actually has resigned due to their belief that their employer has not properly considered their request for an extension of unpaid parental leave.

If the Government is concerned about the female employment participation rate and wants to encourage more women to remain in the workforce, other measures, including the availability and affordability of flexible and high quality childcare would be more effective.

The available data on requests for an extension of unpaid parental leave as referred to in the RIS on page xliii, indicates that such as requests are very rare, with only approximately 1.5% of employers having received a request. In addition, as illustrated by the "*"General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2009–2012"* published by the Fair Work Australia in November 2013, more than 96 per cent of such requests are granted by the employer[1]. Therefore, the number of employers that could possibly be affected by resignations associated with requests for extensions of unpaid parental leave is insignificant, likewise the total number of employees that resign for this reason. In light of this data, there is no case for imposing additional statutory obligations on business.

Furthermore, in the event an employer would fail to conduct a meeting a discussion via telephone before making a decision to refuse an extension request, this would constitute a breach of the National Employment Standards and expose the employer to financial penalties of up to $10,200 for an individual and $51,000 for a body corporate. Business SA submits that this is unreasonable and disproportionate.

Business SA notes that the Federal Government has embarked on an important journey to cut $1 billion of red tape each year. We strongly support this initiative as it has great potential to significantly reduce the regulatory burden on business so that business owners can spend more time and resources on developing and growing their business and staff, as opposed to administration and paperwork. However, an integral part of this initiative must be a commitment to not introduce additional regulatory requirements on business unless it can be demonstrated that government intervention and regulation is absolutely necessary. There is no compelling evidence or reasoning to justify the increase in red tape in the form of introduction of mandatory discussions under section 76(5A). Accordingly, Business SA submits that section 76 should remain in its current form and not be amended.

[1] Page 66

Part 2 - Annual leave loading on termination

The amendment to section 90(2) ensures that on termination of employment the employee will be paid their base rate of pay, unless an industrial instrument, for example a Modern Award provides to the contrary. This ensures that the long-established and generally accepted position that annual leave loading is not payable on termination of employment is maintained.

The Fair Work Ombudsman in 2010 received advice from Senior Counsel that section 90(2) should be interpreted to require annual leave loading to be payable on termination whenever annual leave loading is provided for in an applicable industrial instrument, even when the applicable industrial instrument specifically precluded annual leave loading on termination.

This gave rise to the absurd situation where in applying this interpretation, 17 per cent of all Modern Awards were in breach of the Act given their specific provisions precluding annual leave loading on termination. More absurdly, employers could find themselves in breach of the Act and subject to prosecution and penalties simply for complying with an explicit provision of their Modern Award.

In Business SA's experience the interpretation of section 90(2) caused significant confusion and uncertainty among business, particularly small business. The fact that a specific provision of a Modern Award was said to be in breach of the Act, meant that businesses questioned other provisions and the stability and integrity of the Modern Award system as a whole.

In addition, it imposed additional costs on termination, costs that historically had never been incurred by a business upon the resignation or termination of the employee.

In Business SA's submission to the Panel, we requested legislative amendments to ensure that the historical and widely accepted treatment of annual leave loading on termination was maintained. We note the recommendation 6 of the Panel's report provided for this, but that the previous Gillard/Rudd Federal Government refused to take action to provide regulatory certainty and remove this cost impost.

We commend the Government for taking up recommendation 6 of the Panel's report to finally resolve this matter that has caused uncertainty and confusion for employers for the last four years.

Part 3 – Taking or accruing leave while receiving worker's compensation

The entitlement to and accrual of annual leave exclusively is regulated by the Act for National System Employees, except where the employee is in receipt of workers' compensation payments, in which case the Act defers to the relevant State or Territory workers' compensation law.

The Bill seeks the repeal of section 130(2), which states that annual leave is not accrued while in receipt of workers' compensation payments, unless a State or Territory workers compensation law provides to the contrary.

In South Australia, section 40(2) of the *Workers Rehabilitation and Compensation Act 1986* states the following:

"Where a worker is absent from employment in consequence of a compensable injury, the period of absence shall for the purposes of computing the worker's entitlement to annual leave or sick leave under any Act, award or industrial agreement, be counted as a period of service in the worker's employment".

Therefore as a general rule, annual leave will continue to be accrued. However, section 40(3) of the *Workers Rehabilitation and Compensation Act 1986* provides the following limitation:

"Where a worker has received weekly payments in respect of total incapacity for work over a period of 52 weeks or more, the liability of the employer to grant annual leave to the worker in respect of a year of employment that coincides with, or ends during the course of, that period shall be deemed to have been satisfied."

This means that up until a period of 52 weeks of total incapacity, an employee will continue annual leave. However, in the case an employee has been in receipt of workers' compensation payments for total incapacity for a period of 52 or more weeks, annual leave will no longer continue to be accrued.

According to the South Australian Office of the WorkCover Ombudsman, the issue of annual leave accrual while receiving workers compensation commonly is raised with the Office and section 130(2) appears to be causing confusion and uncertainty as to whether annual leave is accrued or not[2].

Given that annual leave is entitlement arising out of Federal legislation or Federal industrial instruments for National System Employees, for simplicity the Act should regulate annual

[2] Office of the Workcover Ombudsman 2013, http://www.wcombudsmansa.com.au/TopicalIssues/Whatleaveentitlementsdoesaninjuredworkerhave.aspx

leave in all circumstances. The fact that the employee receives workers' compensation payments does not warrant deferring to State and Territory workers' compensation law. The current situation is confusing as employers need to refer to two sets of legislation – the Act as well as State and Territory laws to determine whether an employee should continue to accrue annual leave while receiving workers' compensation payments. Having one set of rules regarding the accrual of annual leave applying to all National System Employees would reduce the regulatory complexity, reduce confusion and uncertainty and reduce the prevalence of disputation under the respective State and Territory workers' compensation laws.

The Panel recommended the repeal of section 130(2), pointing out that it was not clearly drafted, that it resulted in confusion and may require costly legal advice to be obtained. Business SA agrees with the Panel's reasoning in this regard.

Part 4 - Individual flexibility arrangements

For a number of years Business SA has publically called for and supported measures that allow individual employees to negotiate mutually beneficial workplace arrangements with their employer.

From 1996 to 2006 Australian Workplace Agreements (AWAs) were part of Australia's workplace relations without angst and provided a great deal of flexibility to employers and employees.

It was only in 2006/2007 when the 'no disadvantage test' was removed and AWAs became 'embroiled' in the campaign against the *WorkChoices* reforms that AWAs became 'a no go zone' for both major political parties.

However, both of the major political parties support the concept of an agreement reached between individual workers and their employer, which allows the relevant award or enterprise agreement provisions to be departed from, subject to the worker not being disadvantaged. The current form of agreement under the Act is an Individual Flexibility Arrangement (IFA.)

Whilst IFAs appeared to promise so much in reality they have not proved to be a meaningful replacement for the flexibility provided by AWAs for a number of reasons. The Act prevents employers from offering IFAs as a condition of employment. They are very limited in scope - only five specified matters can be varied, they offer little stability as they can be unilaterally terminated by the giving of thirteen weeks' notice and they can be overridden by a subsequent collective agreement.

Very few employers are prepared to make an IFA with an employee and pay a wage increase in return for certain flexibilities, when there is no long term stability as the employee can give notice and cancel the agreement.

Resultantly, few employers see IFAs as a viable alternative to genuine individual workplace agreements. Also, there have been many instances where unions have refused to sign enterprise agreements unless the flexibility provision in the enterprise agreement which enables IFAs prevents any meaningful flexibility.

The Bill proposes the following five changes in relation to IFAs:

- the introduction of an employee genuine needs statement;
- the introduction of thirteen weeks notice for unilateral termination of an IFA;

- the introduction of a legislative note to clarify that an IFA can provide for non-monetary benefits;
- the introduction of a defence against a contravention of flexibility term where the employer reasonably believes that the requirements were complied with; and
- ensuring that an enterprise agreement cannot reduce the scope of an IFA.

The provision of a genuine needs statement in proposed section 144(4)(c) and 203(4) may offer some additional certainty for employers entering into IFA, in particular where non-monetary benefits are provided at the request of the employee. In addition, the legislative note to section 144(4) and 203(4) may further clarify the current position on non-monetary benefits in determining whether an employee is better off overall. Section 203(6)(a) aligns the notice period for unilateral termination of an IFA under an enterprise agreement with the increase to the notice period made by the Fair Work Commission in the Modern Awards Review 2012. These are all valuable amendments that will provide some additional certainty for employers who are considering offering IFAs.

However, the most substantial amendment is section 203(2)(aa) that will ensure that IFAs may offer meaningful flexibility under enterprise agreements. On far too many occasions employers have no option but to bow to union demands for a severely restricted flexibility clause in order for the union to sign the proposed enterprise agreement. Business SA strongly supports the insertion of new section 203(2)(aa) as it will ensure greater access to individual flexibility under enterprise agreements to the benefit of both employers and employees.

Whilst these amendments are welcome, Business SA submits that further amendments are required to ensure genuine individual flexibility. The model award flexibility term included in all 122 Modern Awards in the Fair Work Regulations limits individual flexibility to arrangements about when work is performed; overtime rates; penalty rates; allowances and leave loading.

This means that while an employee can agree to trade off for example overtime and weekend penalties in exchange for flexible working arrangements to enable school pick ups and meeting other family commitments, award-covered employees are unable to request to cash out a portion of their annual leave on an individual basis. In addition, whereas ordinary working hours can be varied and penalties, overtime and allowances can be absorbed into an annual salary, employees and employers are unable to agree to a shorter minimum engagement. These limitations are artificial and arbitrary and there are no substantive public policy reasons for restricting IFAs to the five matters identified above.

Given the very limited scope of the current model flexibility term in Modern Awards and the Fair Work Regulations, it is hardly surprising that IFAs are not widely used. As demonstrated by the "*General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements 2009–2012"* published in November 2012, only 11 per cent of employers surveyed had entered into an IFA[3]. The main reason, 51% , for not offering an IFA was that employers had not identified any need for doing so[4]. This suggests that IFAs in their current form are ineffective, are too limited in scope and that in many employers' minds mainly are able to deal with trivial or insignificant matters.

To ensure that IFAs are able to offer meaningful flexibility, the Act should be amended to require flexibility terms in Modern Awards and enterprise agreements to cover all provisions of the Modern Award or enterprise agreement so that an en employee and their employer is able to vary any provision on an individual basis by mutual agreement, subject to the employee being better off overall. In addition, the current prohibition on IFAs as a condition of employment creates unnecessary complexity and administration. Rather than being able to be upfront with their prospective employees about their industrial arrangements, including IFAs and outlining their benefits and practical effect, employers are required to leave such discussions until after the person has commenced employment. The Act should be amended to allow employers to offer IFAs as a condition of employment to prospective employees.

[3] Page 35
[4] Page 39

Part 5 - Greenfields agreements

Greenfields projects, whether involving building and construction, infrastructure or mining or resources development may bring significant economic benefits and employment opportunities to States, Territories or to the Nation as a whole. In order to obtain finance and necessary regulatory approvals for these large and long-term projects, stable industrial arrangements through a Greenfields agreement commonly is a pre-condition.

However, as demonstrated by the evidence presented to the Panel, the bargaining tactics employed by some unions have resulted in significant delays and cost blowouts given the effective industrial veto power unions currently have in Greenfields negotiations. It could also threaten future investments in major projects to the detriment of the local and/or the national economy.

Currently unions are under no obligation to comply with the good faith bargaining requirements and refrain from capricious conduct. This means that there is no mechanism for ensuring that negotiations are progressing effectively and in a timely manner and to deal with union tactics that are targeted at undermining the bargaining process.

We strongly support the proposed amendments in part 5 of the Bill. Extending the good faith bargaining requirements to the bargaining representatives in relation to a Greenfields agreement will ensure that an employer is able to seek bargaining orders against unions who are deliberately engaging in conduct contrary to the good faith bargaining requirements. Proposed section 178B and 182(4) is equally important as it provides a mechanism for the expeditious negotiation and approval of a Greenfields agreement. The three month notified negotiation period will ensure that negotiations for a Greenfields agreement can be completed within a reasonable timeframe in cases where the employer has issued such a notice to the bargaining representatives.

The proposed amendments will assist in minimising the risk of cost blowouts and delays to major projects caused by industrial relations factors. However, we urge the Government to continue to monitor the effectiveness of these measures and be prepared to take further action should this be necessary.

Part 6 - Transfer of business

Business SA supports the amendments proposed in Schedule 1, part 6 of the Bill as it would eliminate the time and expense it takes to make applications to the Fair Work Commission to avoid the transfer of a previous employer's industrial instrument, where the employee wants to transfer.

However, the real problem lies in the transfer of business rules themselves. They are very broadly cast and capture normal business transactions which are far from the former transmission of business rules and their purpose.

Transmission of business rules were intended to address the possibility that an employer could evade employment obligations imposed by enterprise specific industrial instruments (such as company awards or enterprise agreements) by moving that part of business and those employees to another employer. The transfer of business rules are intended to try to ensure that once an employee does a certain type of work, his or her current entitlements cannot change.

The transfer of business rules are totally inappropriate apparent safeguards in a highly competitive, changing environment challenged by various forms of disruptive technologies. The 'safeguard' of the transfer of business rules is apparent only because they have removed incentives for an incoming employer to retain former staff when taking over a business (in the broad sense meant under the transfer of business rules). Consequently, many new employers have been reluctant to employ the former employer's employees because they do not wish to be bound by the previous employer's industrial instrument, and reasonably so, particularly if they are or wish to do something different. As a result, those with few relevant specialist skills, the most vulnerable, are least likely to be taken on by a new employer when there is a transfer of business.

Part 7 - Protected action ballot orders

The decision by the Full Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53* demonstrated that a "strike first, talk later" approach is consistent with the Act, meaning that unions may engage in industrial action even before they have engaged in any bargaining for an enterprise agreement.

This issue attracted a multitude of submissions to the Panel and we note that the Panel's recommendation number 31 proposed an amendment to require bargaining to have commenced before an application for a protected action ballot can be made.

Business SA's position is that protected industrial action should only be available where parties enterprise bargaining has commenced. Allowing industrial action before any enterprise bargaining has commenced gives the green light to for unions to take action that is not directly related to seeking to advance their claims in relation to an enterprise agreement. Further, it encourages confrontation and conflict rather than negotiation and discussion.

Business SA welcomes and strongly supports the insertion on new section 437(2A) and the accompanying note that will overturn the decision in the JJ Richards Case by ensuring and clarifying that an application for a protected action ballot cannot be made unless there has been a notification time in relation to the proposed enterprise agreement, i.e. that genuine bargaining has commenced.

The amendment will ensure that protected industrial action once again becomes an option of last resort, after exhausting other available options rather than the being the preferred option.

Part 8 - Right of entry

The commencement of the Act in 2009-2010 significantly expanded union right of entry. This was in clear conflict with the commitments and promises made by Australian Labor Party during the 2007 Federal election to *"maintain the existing right of entry rules"*[5] and that *"existing right of entry laws will be retained"*[6]. Further, when challenged on whether these policy commitments would be kept once in Government, employers were given a guarantee that there would be no expansion of union right of entry:

"I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like … we will be delivering our policy as we have outlined it."[7]

However, rather than retaining the existing right of entry provisions that linked union right of entry to being covered by the employer's award or enterprise agreement, the Act vastly expanded their right to enter workplaces by linking it entry to union eligibility rules. The practical effect was that unions now were entitled to enter workplaces where there was no industrial instrument they were a party to or where they have no members. All that is required is that employees potentially could become members.

In addition, enterprise agreements are able to provide right of entry for a range of other reasons in addition to the already expanded legislated entry regime as highlighted by the Federal court decision in *Australian Industry Group v Fair Work Australia [2012] FCAFC 108.*

With the amendments made by the *Fair Work Amendment Act 2013*, unions were given even greater access to workplaces and the few protections provided to employers watered down even further. Following these amendments employers based in remote locations are required to facilitate transport and accommodation for union officials seeking entry and union officials have a right to access meal or break rooms if no agreement is reached on accessing an alternative room.

It is clear that since the commencement of the Act in 2009-2010, unions have significantly increased their visits to workplaces, particularly in resources industry with employers and their representatives reporting of up to 700 visits in a year for an individual employer, in some instances up to 17 visits in one day.[8] This not only causes disruption to existing work, but

[5] Australian Labor Party 2007, Forward with Fairness: Policy Implementation Plan, August 2007, page 23
[6] Ibid, page 2.
[7] Deputy Opposition Leader, National Press Club Address, 8 November 2007
[8] Explanatory Memorandum, RIS

results in the diversion of resources from productive work to activities associated with the union entry, including inductions and escorting the officials around the premises.
Business SA welcomes and strongly supports the provisions in the bill that are aimed at restoring some balance in relation to union right of entry, including:

- repealing the provisions inserted by the *Fair Work Amendment Act 2013* in relation to the facilitation of transport and accommodation for union officials at remote sites and access to lunch rooms;

- providing new rules on entry for discussion purposes requiring the union to either be covered by the employer's enterprise agreement or to have been invited by an employee who is a member or prospective member; and

- expanding the power of the Fair Work Commission in dealing with right of entry disputes and require it to consider the cumulative effect on the employer of union entries.

The amendments will ensure that unions still have access to workplaces to inspect suspected contraventions affecting their members and are able to meet existing and prospective members and go some way in addressing the excessive visits experienced by some employers and the widely expanded access to workplaces since the enactment of the Act.

Conclusion

Business SA broadly supports the introduction of the Bill. It contains a number of important measures to restore a better balance in the Act, particularly in relation to Greenfields agreements, right of entry and protected action ballots. It also provides greater certainty and removes ambiguity in relation to annual leave loading on termination and the accrual of annual leave while in the receipt of workers compensation payments.

While the amendments in relation to IFAs are valuable, they are inadequate and insufficient to create genuine individual flexibility. Due to their limited scope, IFAs are not widely used. Legislative amendments are required to ensure that any provision of a Modern Award or enterprise agreement can be varied on an individual basis, subject to the employee being better off overall. There are no substantive public policy reasons for restricting IFAs to the five specified matters.

Business SA opposes the amendment regarding extensions of unpaid parental leave. There is no evidence to demonstrate that there is any problem with the existing Act as it is. The basis for this additional regulation appears very weak and based on speculation rather than objective data exhibiting a genuine public policy issue. No data has been presented to show that the lack of mandatory discussions results in an excessive amount of working women leaving the labour market. On the contrary, the data that is available demonstrates that employers are very flexible with 96 per cent of all extension requests being granted.

The amendment would further add to the regulatory and administrative burden of employers, which appears contrary to the Federal Government's stated intent to cut red tape.

Who we are

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.