4

Schedules 2 & 4 – Modern awards objective and right of entry

4.1 This chapter examines proposed clauses contained in the Fair Work Amendment Bill 2013 (the Bill) amending the provisions of the *Fair Work Act 2009* (the Act) relating to the modern awards objective (Schedule 2) and right of entry provisions (Schedule 4).

Schedule 2 – Modern awards objective

4.2 Section 134 of the Act establishes the modern awards objective, requiring the Fair Work Commission (FWC) to ensure that modern awards, as well as the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. When assessing modern awards against the Act's stated objectives for modern awards, the FWC considers a range of factors including, but not limited to:

- the need to encourage collective bargaining;
- the need to promote social inclusion through increased workforce participation; and
- the need to promote flexible modern work practices and the efficient and productive performance of work.[1]

4.3 Schedule 2 proposes to amend the modern awards objective provided in s134(1)(d) of the Act to include the need to provide additional remuneration for:

- employees working overtime; or
- employees working unsocial, irregular or unpredictable hours; or

1 *Fair Work Act 2009*, s 134.

- employees working on weekends or public holidays; or
- employees working shifts.[2]

4.4 The amendments in Schedule 2 were not canvassed by the Fair Work Act Review Panel (the Review Panel).

Stakeholder feedback

4.5 The provisions of Schedule 2 were strongly supported by employee organisations and some legal advice services.[3] The Australian Council of Trade Unions (ACTU) commented that recognising the proposition that additional remuneration should be provided to employees working overtime, irregular hours, on weekends or in shifts, 'should be uncontroversial because it merely reflects the status quo … for over 100 years'.[4]

4.6 However, business and industry representatives did not support the measures.[5] The Australian Chamber of Commerce and Industry (ACCI) strongly opposed the provisions, commenting that the FWC's current powers make it 'more than capable to exercise its discretion in a manner which does not require further legislative direction'.[6] ACCI stated:

> The amendment would effectively elevate… discretionary terms to a de-facto mandatory status without any strong policy rational to justify this anomalous approach to deciding which terms should be included in the modern award safety-net. An approach which has not been contemplated in over 100 years of the federal [industrial relations] system.[7]

---

2 Item 1, Schedule 2, Fair Work Amendment Bill 2013.

3 Australian Council of Trade Unions (ACTU), *Submission 9*, p. 14; National Working Women's Centres (NWWCs), *Submission 8*, p. 3, 5; United Services Union (USU), *Submission 26*, p. 3; Australian Nursing Federation (ANF), *Submission 22*, p. 2; Shop, Distributive and Allied Employees' Association (SDA), *Submission 37*, pp. 15-16; Textile, Clothing and Footwear Union of Australia (TCFUA), *Submission 39*, p. 6; Employment Law Centre of Western Australia (ELC), *Submission 40*, p. 3.

4 ACTU, *Submission 9*, p. 14.

5 Australian Chamber of Commerce and Industry (ACCI), *Submission 12*, p. 19; Business SA, *Submission 2*, p. 12; Master Builders Australia (MBA), *Submission 14*, p. 13; National Farmers' Federation (NFF), *Submission 3*, p. 17; Master Electricians Australia (MEA), *Submission 11*, p. 13; Housing Industry Association (HIA), *Submission 19*, p. 8; South Australian Wine Industry Association, *Submission 21*, p. 5; Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submission 17*, p. 6; Australian Mines & Metals Association (AMMA), *Submission 23*, p. 31; Australian Motor Industry Association (AMIF), *Submission 30*, p. 8; Business Council of Australia (BCA), *Submission 34*, p. 2; Australian Industry Group (AiG), *Submission 32*, p. 9; Australian Federation of Employers and Industries (AFEI), *Submission 38*, p. 13.

6 ACCI, *Submission 12*, pp. 19-20.

7 ACCI, *Submission 12*, p. 20.

4.7 The Australian Industry Group (AiG) noted that numerous awards already include the flexibility for an employer and an employee to reach agreement on an annual salary arrangement rather than paying penalty rates, stating that 'there is a significant risk that these vital flexibilities will be lost if the ill-conceived legislative change is made'.[8]

4.8 Business SA expressed strong concern that the clauses would 'effectively enshrine penalty rates in the Modern Awards'. The organisation further stated:

> Whilst overtime and penalty rates are a 'common' award provision, they are not contained in every award either because they are considered not appropriate for a particular industry or occupation, such as the real estate industry and professional employees awards … allow for employees to be compensated in another manner, such as annualised salaries.[9]

4.9 Business SA also commented that the clause would 'severely restrict' the FWC's review of modern awards.[10] Reiterating this line of opposition, Master Builders Australia (MBA) described the provision as 'inflexible in the extreme'.[11]

4.10 DEEWR clarified the application of penalty rates:

> In terms of penalty rates, in relation to the new modern awards objective this does not mean penalty rates must be included in all awards. The Fair Work Commission will retain the ability to determine the appropriate level of wages and penalty rates, if any, in modern awards, based on evidence presented by employer and employee representatives.[12]

Schedule 4 – Right of entry

4.11 The Act establishes rights of officials of organisations who hold entry permits to enter premises and exercise certain powers while on those premises.[13] It establishes a framework under which permit holders may enter premises for investigation and discussion purposes. The Explanatory Memorandum to the Bill commented that this existing framework

8 AiG, *Submission 32*, p. 9.

9 Business SA, *Submission 2*, p. 12.

10 Business SA, *Submission 2*, p. 12.

11 MBA, *Submission 14*, p. 13.

12 John Kovovic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 24.

13 *Fair Work Act 2009*, Part 3-4.

> appropriately balances the rights of organisations to represent their members in the workplace, the right of employees to be represented at work and the right of occupiers of premises and employers to go about their business without undue inconvenience.[14]

4.12 The Bill's amendments provide:

- for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which employees take meal or other breaks and is provided by the employer for that purpose;[15]
- FWC powers to deal with disputes about the frequency of visits to workplaces;[16]
- FWC powers to facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;[17] and
- FWC powers to deal with disputes in relation to accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement.[18]

4.13 DEEWR submitted that:

> Encouraging parties to agree to a location for interviews or discussions should assist to reduce the incidence of conflict between occupiers and permit holders. It will encourage parties to resolve any disputes between themselves by negotiating appropriate arrangements that meet the needs of both parties.[19]

4.14 DEEWR asserted that Schedule 4 would implements the Government's response to two of the three recommendations made by the Review Panel in relation to right of entry.[20]

---

14 Explanatory Memorandum, Fair Work Amendment Bill 2013, p. 32.
15 Item 7, Schedule 4, Fair Work Amendment Bill 2013.
16 Item 12, Schedule 4, Fair Work Amendment Bill 2013.
17 Item 14, Schedule 4, Fair Work Amendment Bill 2013.
18 Item 10, Schedule 4, Fair Work Amendment Bill 2013.
19 DEEWR, *Submission 16*, p. 20.
20 DEEWR, *Submission 16*, p. 19.

Stakeholder feedback

4.15 The amendments to the right of entry provisions in Schedule 4 were strongly supported by employee organisations. [21]

4.16 For example, the Community and Public Sector Union (CPSU) believed the Bill's right of entry clauses are 'sensible proposals which will enhance employees' rights to representation in the workplace'.[22]

4.17 However, business and industry representatives strongly oppose these measures.[23] The most common grounds for objection to provisions proposed in Schedule 4 were:

- the measures exceed the recommendations of the Review panel;
- proposed FWC powers to resolve right of entry disputes; and
- transport and accommodation provisions.

Right of entry and location provisions

4.18 The Bill proposes to amend the Act so that interviews and discussions are held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which employees take meal or other breaks and is provided by the employer for that purpose.[24]

4.19 ACCI expressed strong concerns that the proposed amendments went beyond the recommendation of the Review Panel:

> There was no recommendation that a default position, absent of an agreement, would be the meal or other break locations at the workplace. … The Panel did not recommend any amendments to allow a statutory cap for costs associated with charging permit holders access to privately operated accommodation and transportation to remote sites.[25]

4.20 The Australian Mines & Metals Association (AMMA) submitted that the Bill's right of entry provisions should be amended to revert back to the Review Panel's recommendations. [26] The Review Panel recommended that

---

21 ACTU, *Submission 9*, p. 22; Community and Public Sector Union (CPSU), *Submission 4*, p. 5; USU, *Submission 26*, p. 3; ANF, *Submission 22*, p. 2; TCFUA, *Submission 39*, p. 5.

22 CPSU, *Submission 4*, p. 5.

23 ACCI, *Submission 12*, p. 27; Business SA, *Submission 2*, p. 16; Godfrey Hirst Australia Pty Ltd, *Submission 13*, p. 5; MBA, *Submission 14*, p. 19; Australian Business Industrial (ABI), *Submission 15*, p. 25; HIA, *Submission 19*, p. 9; VECCI, *Submission 17*, p. 8; AMMA, *Submission 23*, p. 7; BCA, *Submission 34*, p. 1; AiG, *Submission 32*, p. 11; Rio Tinto, *Submission 35*, p. 4; AFEI, *Submission 38*, p. 22;

24 Item 7, Schedule 4, Fair Work Amendment Bill 2013.

25 ACCI, *Submission 12*, pp. 27-28; MEA, *Submission 11*, p. 17.

26 AMMA, *Submission 23*, p. 9.

the Act be amended to provide the FWC with greater power to resolve disputes about the frequency of visits, and the location 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.[27]

4.21 Rio Tinto and the international law firm based in Australia, Allens, expressed similar concerns.[28]

4.22 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions countered industry and employers concerns with the unions' stance that the lunchroom is an appropriate default position. He asserted:

> In relation to location it is important to note that our right to have discussions with employees is a right which can only be exercised in unpaid time- that is during people's meal breaks. In those circumstances we do think it is appropriate that the default position is that, unless otherwise agreed, people can have that right where they are normally taking their break. In fact, that is the way that the legislation operated prior to 2006. The default position was lunch room access.[29]

4.23 The ACTU pointed to examples of inappropriate venues to conduct right-of-entry discussions cited by affiliate members:

> meeting rooms next to employers' offices and places which are a large distance from where workers are actually taking what might be quite short meal breaks- as short as 20 minutes. These kinds of things functionally remove the rights of entry.[30]

4.24 The Community and Public Sector Union added that they thought the new provisions sensible. Ms Nadine Flood, National Secretary referenced further unsuitable scenarios:

> such as one [instance] we had recently where a union organiser was told the room available was a desk in the middle of the management area of the workplace and workers would sit next to that desk if they chose to access that union representative. They

---

27 Fair Work Act Review Panel, *Towards more productive and equitable workplaces*, Canberra, June 2012, (Recommendations 35, 36), pp. 195-197.

28 Rio Tinto, *Submission 35*, p. 4; Allens, *Submission 28*, p. 2.

29 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Committee Hansard*, 24 May 2013, Melbourne, p. 2.

30 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Committee Hansard*, 24 May 2013, Melbourne, p. 2.

> are quite powerful and intimidating examples, particularly for the women that we predominantly represent.[31]

4.25 Ms Flood emphasised that union representative discussions with employers often took place with staff in rooms, other than a lunchroom, on employees request:

> …there are often cases where…workers would prefer a private room to have a more confidential discussion with a union organiser around the issues that they are raising with their employer. Often those workplaces are where they feel somewhat intimidated or they have a view that their employer is anti-union.[32]

Fair Work Commission powers to resolve right of entry disputes

4.26 The Bill grants new powers to the FWC to resolve the following right of entry disputes:

- disputes about the frequency of visits to workplaces;[33]
- disputes about accommodation and transport arrangements for permit holders in remote areas and the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;[34] and
- disputes about accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement.[35]

4.27 Reflecting stakeholder support for the FWC to have a role in resolving disputes about right of entry as originally recommended by the Review Panel, there was broad support for this clause.

4.28 The ACTU, AiG, MBA, Australian Motor Industry Federation and the Law Society of New South Wales expressed support for the FWC to be granted powers to hear disputes regarding the frequency and location of visits by permit holders to worksites, as originally recommended by the Review Panel.[36] However, while providing general support for the proposal, some

---

31 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard,* 24 May 2013, Melbourne, p. 3.

32 Ms Nadine Flood, National Secretary, Community and Public Sector Union, *Committee Hansard,* 24 May Melbourne, p. 4.

33 Item 12, Schedule 4, Fair Work Amendment Bill 2013.

34 Item 14, Schedule 4, Fair Work Amendment Bill 2013.

35 Item 10, Schedule 4, Fair Work Amendment Bill 2013.

36 ACTU, *Submission 9*, p. 23; AiG, *Submission* 32, p. 14; MBA, *Submission 14*, p. 20; AMIF, *Submission 30*, p. 10; Law Society of NSW, *Submission 6*, p. 7.

of these stakeholders expressed concern with regard to the specifics of the clause. [37]

4.29 ACTU expressed some concern that the Bill should set a 'high bar' before the FWC 'restricts the rights of permit holders'.[38] Similar comments were made by the Textile, Clothing and Footwear Union of Australia.[39] By contrast, the MBA was concerned that the Bill 'appears to place [a] high threshold' when the FWC adjudicates the frequency of permit holders' visits.[40]

4.30 The AiG expressed concern that the provision, as currently drafted, is 'inadequate to address the problem identified by the Review Panel' explaining that:

> the amendment gives the FWC a very limited discretion to deal with a dispute about the frequency of visits. The statutory test in subsection 505(4) requiring the employer to explain how the frequency of visits of the permit holder would be an unreasonable diversion of the occupier's critical resources, would place a very onerous evidentiary burden on the employer. The inclusion of the word 'critical' imposes a test that would be virtually impossible to meet.[41]

Transport and accommodation provisions to remote locations

4.31 Part 3-4 of Schedule 4 of the bill proposes to amend the Act to facilitate assistance with transport and accommodation for permit holders at remote sites and limit the amounts that an occupier can charge a permit holder for provision of accommodation or transport at remote sites to cost recovery.

4.32 The Australian Mines & Metals Association (AMMA) expressed strong reservation at the accommodation and transport provisions to remote locations of the Bill's right of entry clauses:

> Many remote locations, including offshore facilities and vessels are accessible by commercially available transport. That is precisely how the occupier arranges, and pays, to transport workers and contractors to and from a site. Where commercially available transport is available, unions should have to make their own

37 TCFUA, *Submission 39*, p. 21.
38 ACTU, *Submission 9*, p. 23 .
39 TCFUA, *Submission 39*, p. 21.
40 MBA, *Submission 14*, p. 20.
41 AiG, *Submission 32*, p. 15.

> arrangements if they require such transport to access remote worksites.[42]

4.33 AMMA expressed a range of concerns about union visits to their remote sites, including having sufficient separate sleeping accommodation for permit holders, in the context of accommodation shortages being experienced, particularly in the offshore hydrocarbons sector. The AMMA intimated that employers' flexibility would be compromised; employees might be inconvenienced in order that the union officials be able to be accommodated in separate quarters and that additional costs would be borne by the employer for cleaning their rooms.[43]

4.34 DEEWR clarified the meaning of a remote site:

> A remote site is really a site that there is no other way of accessing other than by employer-provided transport. For instance, in the discussions that we have had with a number of stakeholders around the provisions of the bill, the sorts of areas that cropped up were pastoral properties. For instance, if a pastoral property can be reached by way of road, either the permit holder using their own vehicle or one provided by the organisation that they represent, it would not be covered by the provisions. Similarly, if the permit holder was able to fly to a nearby airport and then do the rest of the trip by way of car or road or whatever, it would not be captured by the provisions of the bill. It is really those circumstances where the only means that the permit holder has of accessing the work site is by way of employer-provided transport.[44]

4.35 The ACTU outlined some instances of the obstructions that are occurring the Bill is seeking to remedy:

> The Maritime Union gave direct evidence to the Senate Committee…in relation to this. It is essentially that there is a sub-category of industrial sites, particularly in the resources sector, where it is simply impossible to access the site via normal commercial means, or under your own recognisance…Therefore you are dependent on the transport and accommodation the employer provides, whether those are chartered flights of one form or another or vehicular transport from some form of hub. The examples that have been set out in the submissions that have

42 AMMA, *Submission 23*, pp. 9-10.

43 AMMA, *Submission 23*, pp. 9-10.

44 John Kovovic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 25

> been made by our affiliates go to the practical cases, where they are denied access to that transport or they are offered access at very excessive costs- in other words, a prohibitive cost which is, in our view and the view of our affiliates, more than it would have cost the employer to provide in the first place.[45]

Committee comments

4.36 The Committee recognises that there are opposing interests and views about the desirability of the measures proposed by this Bill.

4.37 However, given the extensive consultation that has taken place on the proposals put forth in this Bill, the Committee is of the opinion that it provides an appropriate balance in addressing the policy intent of the Bill.

4.38 Accordingly, the Committee recommends that the House of Representatives pass the Fair Work Amendment Bill 2013.

Recommendation 1

4.39 **The Committee recommends that the House of Representatives pass the Fair Work Amendment Bill 2013.**

Mike Symon MP
Chair

45 Mr Tim Lyons, Associate Secretary, ACTU, *Committee Hansard*, 24 May Melbourne, p. 4.