CHAPTER 2

Key issues

Introduction

2.1 The committee received submissions to this inquiry from employer associations and employee unions in roughly equal measure. Across most provisions contained within this bill, responses were divided between those two groups.

Part 1: Payment for annual leave

2.2 Part 1 of the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (the Bill) amends section 90 of the *Fair Work Act*, in line with recommendation 6 of the Fair Work Review Panel, to provide that on termination of employment, untaken annual leave is paid out at the employee's base rate of pay.[1]

2.3 The amendment stipulates that the hourly rate paid out must not be less than the employee's base rate of pay that is payable immediately before the termination time.[2]

2.4 The effect of this amendment is that annual leave loading will not be payable on termination of employment unless the employee is employed under an applicable modern award or enterprise agreement which expressly provides for a more beneficial entitlement than their base rate of pay.[3]

2.5 The Australian Council of Trade Unions (ACTU) noted that this amendment may result in some employees losing their current entitlements, since the payout of annual leave not taken when an employee's employment ends is based on the base rate of pay. It therefore does not include additional matters such as allowances (such as, for instance, additional allowances for particular qualifications) or leave loadings.[4]

2.6 Similarly, the Australian Workers' Union (AWU) opposed the amendment and argued that it may have additional consequences:

> … this provision is likely to encourage employers not to grant periods of annual leave, as they will be able to save money by paying out the annual leave without the associated loadings on termination rather than having to pay annual leave and its loadings during a period of leave.[5]

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1 Explanatory Memorandum, p. 2.

2 Explanatory Memorandum, p. 2.

3 Explanatory Memorandum, p. 2.

4 Australian Council of Trade Unions, *Submission 4*, pp 2-3.

5 Australian Workers' Union, *Submission 5*, p. 7.

2.7 The Australian Chamber of Commerce and Industry (ACCI), however, argued that the amendment should be seen as noncontroversial, merely returning to the system prior to the Fair Work Act:

> This amendment would operate in a way that is fair to all parties. It was not formulated with the intention of taking entitlements away from employees but instead seeks to restore the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay unless the award or enterprise agreement expressly provides for a more beneficial entitlement.[6]

2.8 The AI Group also supported the amendment, on the basis that it brings the legislation in line with the recommendation of the 2012 Fair Work Act Review and clarifies and corrects an apparent error in the Fair Work Act, while also allowing individual awards and agreements the flexibility to add to the base level if appropriate.[7]

2.9 The Department of Employment (the department) clarified that this amendment serves to bring certainty to a provision which had caused considerable confusion:

> Subsection 90(2) of the Fair Work Act requires an employee to be paid, in respect of untaken annual leave entitlements when their employment ends, at the rate the employee would have been paid had he or she taken that leave. This provision has been interpreted in some instances as requiring the payment of annual leave loading on termination of employment, even if award or agreement provisions expressly preclude the payment of the loading upon termination. This interpretation has displaced the longstanding practice in place prior to the Fair Work Act that annual leave loading is only payable at the conclusion of an employee's employment where expressly required by the employee's workplace instrument.[8]

2.10 Therefore this amendment is designed to reduce confusion and bring clarity back to the issue.

Committee view

2.11 The committee believes this amendment corrects an overly confusing provision in the Fair Work Act and will bring certainty and clarity to the question of annual leave payments at the end of an employee's term of employment.

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6 Australian Chamber of Commerce and Industry, *Submission 14*, p. 9.

7 AI Group, *Submission 12*, pp 4-5.

8 Department of Employment, *Submission 16*, p. 18.

Part 2: Taking or accruing leave while receiving workers' compensation

2.12 Part 2 of the bill repeals section 130 (2) of the Fair Work Act; thus an employee who is absent from work and receiving workers' compensation will not be able to take or accrue leave under the Fair Work Act during the compensation period. This amendment implements Fair Work Review Panel recommendation 2.[9]

2.13 Currently, employees in the Queensland and Commonwealth systems are able to accrue annual, personal and long service leave while receiving workers' compensation payments. Employees in the other states and territories are not. The department's submission notes that the provision exists to bring consistency to workers' compensation systems, so that all those on such a system will operate under the same entitlements and restrictions.[10]

2.14 ACCI noted that the majority of state and territory workers' compensation systems already carry this provision, so this amendment will increase clarity and consistency across systems.[11]

2.15 Similarly, the AI Group described the amendment as 'sensible and appropriate', and argued that in cases where employees are on workers' compensation for years on end, 'it would not be appropriate or consistent with longstanding and widespread industry practice for annual leave etc to accrue during this period'.[12]

2.16 As the South Australian Wine Industry Association submission noted in supporting the amendment, the current system is:

> … confusing and potentially misleading as it requires an employer to refer to the relevant State or Territory workers compensation law. For employers with operations in more than one State or Territory this creates additional issues of red tape and inconsistencies.[13]

2.17 Arguing against this proposal, the ACTU maintained that this would doubly disadvantage workers who have been injured at work:

> 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

9 Explanatory Memorandum, p. 3.

10 Department of Employment, *Submission 16*, p. 18.

11 Australian Chamber of Commerce and Industry, *Submission 14*, p. 12.

12 AI Group, *Submission 12*, p. 6.

13 South Australian Wine Industry Association, *Submission 6*, p. 2.

also suffering disadvantage because they are also denied the ability to accrue and take leave.[14]

Committee view

2.18 The committee notes that this amendment brings consistency to current systems and ensures that all Australian workers will have the same standards regarding leave while on workers' compensation. The committee is not persuaded by the argument that this will disadvantage workers, since in the majority of states and territories this provision simply enforces the existing schemes. Rather, the consistency of systems this amendment will lead to is the more equitable approach.

Part 3: Individual flexibility arrangements

2.19 Individual flexibility arrangements (IFAs) are provided for in the Fair Work Act. An employer and an individual employee can make an IFA that varies the effect of certain terms of the award or enterprise agreement under which the employee is employed, to meet their genuine needs.[15]

2.20 IFAs need to meet certain criteria to be valid, and cannot exclude the National Employment Standards. Valid IFAs must:

- set out the terms of the award or agreement that is to be varied;
- be genuinely agreed to by both employer and employee;
- result in the employee being better off than if no IFA were in place; and
- be signed by both employer and employee (and a parent/guardian of employees under the age of 18 years).[16]

2.21 The amendments relating to IFAs in this bill respond to recommendations 9, 11, 12 and 24 of the Fair Work Review Panel and seek to clarify and increase certainty for both employers and employees.

2.22 Division 1 of this part inserts a new paragraph which requires IFAs to include a statement by the employee setting out why they believe that the adjustment/s made meet their 'genuine needs' and leaves them better off than if they remained on the standard award or enterprise agreement. This requirement is a responsibility of the employer. The purpose of this addition is to ensure that both employee and employer have considered whether the adjustment meets the employee's genuine needs.[17]

2.23 Division 2 sets out the mechanisms by which an IFA can be terminated. Previously the minimum notice period by which one party could terminate the

14 Australian Council of Trade Unions, *Submission 4*, p. 8.

15 Explanatory Memorandum, p. 3.

16 Explanatory Memorandum, pp 3-4.

17 Explanatory Memorandum, p. 4

agreement was not specified; the amendment stipulates a 13-week period, while clarifying that if both parties agree, an IFA can be terminated immediately and at any time.[18]

2.24 The Division also includes a legislative note confirming that the requirement that an employee is 'better off overall' can take into account non-monetary benefits. While the Fair Work Act already allowed non-monetary provisions to be taken into account in IFAs, the Fair Work Review Panel recommended that this be explicitly stated. The Explanatory Memorandum includes two illustrative examples on this point, each of which deals with employees agreeing to alter the timing (not the quantity) of hours they work in order to suit non-work commitments, including family responsibilities.[19]

2.25 The Division adds a new section under which an employer does not contravene a flexibility term if, at the time the arrangement was made, they reasonably believed that the requirements of the term were complied with. The 'genuine needs' statement discussed above would provide employers with a defence if it were alleged that they had contravened the flexibility requirements of an award or agreement.[20]

2.26 A further addition is paragraph 203(2)(aa), which provides that an enterprise agreement which includes terms on certain listed matters must also allow those matters to be varied by individuals via an IFA. The matters which fall into this category are:

- arrangements about when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.[21]

2.27 Other matters can still be considered within IFAs, but these five matters must be included. This reflects the flexibility term developed by the Australian Industrial Relations Commission during the award modernisation process (2008), and was reaffirmed by the Fair Work Commission (FWC) in the *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170.[22]

2.28 The department's submission notes that flexible working arrangements can suit both employers and employees, with a variety of benefits including:

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18 Explanatory Memorandum, p. 5.

19 Explanatory Memorandum, pp 5-7.

20 Explanatory Memorandum, p. 8.

21 Explanatory Memorandum, pp 8-9.

22 Explanatory Memorandum, p. 9.

> … greater job satisfaction, improve the ability for employees to manage outside-of-work responsibilities and help employers to attract and retain staff. They are also a recognised lever in reducing the gender pay gap and in supporting women back into the workforce after childbirth.[23]

2.29 The Victorian Hospitals' Industrial Association argued that IFAs have the 'potential to support flexible work arrangements', but because of the 'impediments' to their use under the current legislation, they are under-utilised.[24]

2.30 An alternative perspective was expressed by the ACTU, who argued that IFAs are unnecessary, since existing industrial-level agreements already provide for considerable flexibility for employers and workers to find mutually convenient solutions:

> 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.[25]

2.31 However, while most submitters recognised the benefits of flexible working arrangements in a broad sense, the individual components of IFAs remain some of the more divisive elements of the bill.

Genuine needs statement

2.32 The Australian Workers' Union (AWU) expressed concern over the inclusion in the bill of a provision which would require IFAs to include a written statement signed by the employee outlining why the IFA meets their genuine needs and leaves them better off overall. While this provision's stated purpose is to ensure that an employee genuinely has sought and will benefit from the IFA's terms, the AWU argued that:

> … the inclusion of terms such as a statement by the employee of why they are better off under the IFA, when there is already a term requiring that the flexibility term be genuinely agreed to by the employer and the employee, will serve to formalise employee disadvantage and detriment. Employees may not genuinely believe that they are better off, however they may be subject to undue pressure to sign such an IFA with these statements even if they do not sufficiently understand the consequences, and are then set up to lose any challenge they might seek to make by the provision that effectively absolves the employer from being found in contravention of a modern award flexibility term if they believed they were complying with the requirements.[26]

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23 Department of Employment, *Submission 16*, p. 11.

24 Victorian Hospitals' Industrial Association, *Submission 10*, p. 4.

25 Australian Council of Trade Unions, *Submission 4*, p. 9.

26 Australian Workers' Union, *Submission 5*, p. 8.

2.33 ACCI also argued against this provision, although on the grounds that it added an unnecessary burden on employers:

> The requirements for making individual flexibility agreements are already highly prescriptive and the proposed requirement for a genuine needs statement would just introduce another layer of complexity which could compound the reservations employers have around entering into these arrangements.[27]

2.34 AI Group made a similar argument and suggested that the obligation to include a genuine needs statement in the IFA itself could be replaced by having such a statement accompany the IFA.[28]

2.35 However, the department's submission stated that the inclusion of a genuine needs statement within each IFA would:

> … ensure that both the employer and individual employee consider these requirements [that the IFA meets the employee's genuine needs and leaves them better off overall] before agreeing to an individual flexibility arrangement.[29]

2.36 The genuine needs statement also provides protection for employers, since new section 145AA of the Bill provides that an employer cannot be found to have contravened the flexibility term of a modern award if, when the IFA was made, they reasonably believed that the requirements of the term were complied with. The genuine needs statement:

> … would be available as evidence of the employee's state of mind at the time that the individual flexibility arrangement was agreed to and may be relevant to assessing the reasonableness of the employer's belief that it had complied with those requirements for the purposes of new section 145AA.[30]

2.37 The Chamber of Commerce and Industry of Western Australia noted that this clarification would likely result in an increase in the use of IFAs:

> The clarification that an employer does not breach the FW Act if they reasonably believed the IFA requirements were met will also give employers greater comfort in considering these requests.[31]

2.38 By contrast, the AWU was concerned that, in cases where an employee felt pressured to sign an IFA, including the genuine needs statement, the existence of that statement would serve to minimise their case and leave employees:

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27 Australian Chamber of Commerce and Industry, *Submission 14*, p. 31.

28 AI Group, *Submission 12*, p. 7.

29 Department of Employment, *Submission 16*, p. 17.

30 Explanatory Memorandum, p. 8.

31 Chamber of Commerce and Industry of Western Australia, *Submission 15*, p. 8.

> … set up to lose any challenge they might seek to make by the provision that effectively absolves the employer from being found in contravention of a modern award flexibility term if they believed they were complying with the requirements.[32]

Unilateral termination

2.39 The amendment sets the period of notice for unilateral termination of an IFA at 13 weeks. As the department noted in its submission, 13 weeks is the standard unilateral termination period in modern awards. The department argued that the extended period of notice would provide certainty for both employers and employees.[33]

2.40 The ACTU argued that extending the period of notice for when one party wishes to unilaterally terminate an IFA from 28 days to 13 weeks will disadvantage employees who realise that their IFA has left them worse off and wish to terminate it. Such an extended period of notice will leave employees in this position disadvantaged for several months.[34]

2.41 ACCI noted that a recent Productivity Commission report found that:

> … a key concern held by employers in relation to individual flexibility arrangements is the capacity for an employee to unilaterally terminate the arrangement with 28 days' notice, with the potential to expose the employer to financial and operational risks.[35]

2.42 For that reason, employer groups were generally in favour of the amendment to extend the period of notice to 13 weeks. Some, such as the Australian Mines and Metals Association (AMMA), followed the Productivity Commission report in suggesting that a 12 month period of notice should be considered.[36]

Better off overall requirement

2.43 One requirement of IFAs is that they leave the employee better off overall. While non-monetary factors have been understood to be part of that consideration, the bill includes a note confirming that such factors can be taken into account.

2.44 The department pointed out in its submission that this amendment makes no substantive change to the function of IFAs, but merely clarifies and confirms an already understood component.[37]

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32 Australian Workers' Union, *Submission 5*, p. 8.

33 Department of Employment, *Submission 16*, p. 15.

34 Australian Council of Trade Unions, *Submission 4*, p. 9.

35 Australian Chamber of Commerce and Industry, *Submission 14*, p.31.

36 Australian Mines and Metals Association, *Submission 11*, p. 24.

37 Department of Employment, *Submission 16*, p. 13.

2.45 The ACTU, however, raised concern that the amendment does not incorporate the safeguard included in the Fair Work Review Panel's recommendation, 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'.[38]

2.46 ACCI, in supporting the bill's wording as preferable to that of the Panel's recommendation, argued that the text of the bill would reduce the likelihood of confusion and dispute:

> The assessment of whether a monetary benefit foregone is 'relatively significant' and whether the value of a non-monetary benefit is 'proportionate' is a highly subjective one.

2.47 AMMA also supported the amendment, arguing that, while all that the note does is 'provide clarity and certainty', this clarification should 'provide confidence to employers and employees and will likely result in the net take up of IFAs to introduce genuine flexibility for employees'.[39]

2.48 The Victorian Hospitals' Industrial Association, who supported the IFA amendments overall, suggested that an additional safeguard could be built in to address concerns about the extent to which non-monetary benefits are considered:

> … we submit that those concerns would be alleviated if the relevant provisions and model clause stated that an employee was entitled to have a representative, including a union representative, assist them in making the individual flexibility arrangement.[40]

Allowed matters

2.49 Currently, the Fair Work Act allows enterprise agreements to limit the terms which may be included in IFAs, meaning that individuals may not be able to negotiate IFAs on terms which they wish to have flexibility. The bill amends that provision, requiring the flexibility term in enterprise agreements to include, at a minimum, the following:

- when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.[41]

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38 Australian Council of Trade Union, *Submission 4*, p. 23.

39 Australian Mines and Metals Association, *Submission 11*, p. 24.

40 Victorian Hospitals' Industrial Association, *Submission 10*, pp 4-5.

41 Department of Employment, *Submission 16*, p. 16.

2.50 AI Group noted that the current Act allows unions to block enterprise agreements that include meaningful flexibility options, and that this amendment will therefore address that problem and allow employers and employees to have greater capacity to negotiate flexible terms.[42]

2.51 ACCI similarly argued that the amendment, which they described as 'modest and reasonable', would:

> … address disputation arising regarding the content of individual flexibility arrangements and overcome the practice of unions attempting to limit their scope.[43]

2.52 The National Union of Workers (NUW), on the other hand, argued that blanket rules regarding what terms could be included in IFAs are inappropriate and that, '… it is the parties to an enterprise agreement that are best placed to determine what areas of flexibility should be part of any potential individual flexibility arrangement'.[44]

2.53 The department's submission quoted the Productivity Commission report into the Workplace Relations Framework, arguing that:

> if the opportunity for workplace flexibility is of genuine interest to individuals and firms, as it appears to be in many instances on occasion, it seems perverse to create the opportunity but then allow a collective negotiation process to prevent its use.[45]

Committee view

2.54 The committee is of the view that the amendments to the Fair Work Act contained in the bill relating to IFAs are reasonable, uncontroversial and seek for the most part simply to clarify the existing arrangements. The committee is not persuaded by the arguments that the many safeguards for employees are in any way undermined by these amendments, and instead finds that employees have new and strengthened safeguards, including the addition of a genuine needs statement and an extended period of notice for the termination of an IFA.

Part 4: Transfer of business

2.55 This provision deals with the conditions under which an employee is employed after they transfer from one entity of their employer to another. It is specifically limited to circumstances under which the employee transfers at their own

42 AI Group, *Submission 12*, p. 8.

43 Australian Chamber of Commerce and Industry, *Submission 14*, p. 36.

44 National Union of Workers, Submission 9, p. 2.

45 Department of Employment, *Submission 16*, p. 16.

request and does not apply to instances whereby an employer shifts an employee within their broader corporate group.[46]

2.56 Under the existing legislation, an employee shifting within their employer's overall group would continue under the enterprise agreement or other industrial instrument of their initial employment. The amendment changes that provision, so that employees who move from one entity within a business to another on their own initiative will transfer onto the employment terms and conditions of their new employer.[47]

2.57 This provision enacts Recommendation 38 of the Fair Work Review Panel and aims to reduce unnecessary expense for employers and increase career mobility options for employees.[48]

2.58 The ACTU opposed this provision, arguing that it would allow employers to restructure their operations and offer existing employees 'new' jobs with reduced conditions, 'and few employees would choose 'no job' when their only other alternative was to keep their job on reduced conditions'.[49]

2.59 The Chamber of Commerce and Industry of Western Australia, however, argued that the amendment will correct the situation wherein employees choose to transfer from one part of a business to another yet do not come under the employment conditions of their new, chosen, job, and will also 'make it easier for employees to seek out new employment opportunities within related businesses'.[50]

Part 5: Right of entry

2.60 Part 5 of the bill amends the existing Fair Work Act to:

> … establish a framework under which permit holders may enter premises for investigation and discussion purposes, which 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 to go about their business without undue inconvenience.[51]

2.61 The bill makes four substantive changes to the Fair Work Act regarding right of entry, namely:

- repealing amendments (made by the *Fair Work Amendment Act 2013*) requiring an employer or occupier to facilitate transport and accommodation

46 Explanatory Memorandum, pp 13-14.

47 Explanatory Memorandum, p. 13.

48 Department of Employment, *Submission 16*, p. 19.

49 Australian Council of Trade Unions, *Submission 4*, p. 25.

50 Chamber of Commerce and Industry of Western Australia, *Submission 15*, p. 6.

51 Explanatory Memorandum, pp 14-15.

arrangements for permit holders exercising entry rights at work sites in remote locations;

- providing new eligibility criteria to determine when a permit holder may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers;
- returning to the rules on location of interviews and discussions before these were amended in the *Fair Work Amendment Act 2013*; and
- expanding the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.[52]

2.62 These four components each attracted considerable comment in submissions to this inquiry and are discussed below.

Transport and accommodation arrangements

2.63 The bill amends a provision of the *Fair Work Amendment Act 2013* which required employers to provide transport and/or accommodation for union representatives seeking right of entry to some remote sites. The department notes that this provision was not recommended by the Fair Work Act Review 2012, has been criticised by stakeholders and was not subjected to a Regulation Impact Statement analysis.[53]

2.64 The Chamber of Commerce and Industry of Western Australia noted that this provision was rarely used, even in a state as geographically large as Western Australia, and therefore supported the amendment.[54]

2.65 AI Group also supported the amendment, arguing that the existing provisions remove any incentive for unions and employers to negotiate a sensible and mutually suitable arrangement for transport and accommodation for visits to remote sites.[55]

2.66 However, the ACTU argued that current provisions allow employees at remote locations to have access to their union at their workplace, whereas the amendment will mean that employees at remote workplaces will only have access to their union when the employer voluntarily decides to facilitate such a meeting.[56]

2.67 AMMA, whose members make up a large proportion of the remotely located workplaces in Australia, also noted that, while there had not been a significant

52 Explanatory Memorandum, p. 15.

53 Department of Employment, *Submission 16*, p. 10.

54 Chamber of Commerce and Industry of Western Australia, *Submission 15*, p. 10.

55 AI Group, *Submission 12*, p. 11.

56 Australian Council of Trade Unions, *Submission 4*, p. 32.

increase in request for access to remote sites, they remain opposed to the current system and therefore support the amendment.[57]

2.68 The AMMA further pointed to the safety issues involved and argued that site visits need to be recognised as a burden for the occupier:

> The plethora of safety issues associated with union access to remote sites includes that infrequent travellers require escorting on all offshore platforms and helicopters to ensure their safety at all times. This is a further distraction requiring extra resources to be diverted while at the same time opening up the occupier to significant risk and liability.[58]

Right of entry for discussion purposes

2.69 The bill amends the right of entry provisions to the effect that permit holders can only enter a workplace for discussion purposes if the permit holder's union is covered by an enterprise agreement or if an employee invites the union to send a representative. This aligns with the government's policy of restoring balance to the right of entry framework.[59]

2.70 For unions covered by an enterprise agreement, the right of entry rules are largely unchanged; unions not covered by enterprise agreement will require at least one employee in the workplace to request that the union meet with them. Where an employee wishes the union to enter the workplace for discussions but prefers to remain anonymous, the union can apply for an 'invitation certificate' from the FWC.[60]

2.71 The ACTU expressed concern that the amendment would limit the capacity of employees to access their union, and the capacity of unions to seek in good faith the ability to make an agreement to apply in that workplace.[61]

2.72 The Textile, Clothing and Footwear Union of Australia (TCFUA) noted that this provision would particularly disadvantage workers in the textile, clothing and footwear industry, where conditions can be substandard and awareness of rights, including the role of unions, can be limited:

> The amendments also assume that workers in all workplaces are even aware of what the role of a union is in Australia. For example, consider a typical clothing sweatshop in the TCF industry. The workers will nearly always have come from another country (either as refugees or migrants), commonly have limited English language and written skills, and will be

57 Australian Mines and Metals Association, *Submission 11*, p. 106.

58 Australian Mines and Metals Association, *Submission 11*, p. 105.

59 Department of Employment, *Submission 16*, p. 8.

60 Department of Employment, *Submission 16*, p. 8.

61 Australian Council of Trade Unions, *Submission 4*, p. 27.

> receiving significantly under award wages and other conditions in poor and dangerous physical work environments.[62]

2.73 Employer associations such as the AI Group, ACCI, and the Chamber of Commerce and Industry of Western Australia supported the amendment, with the latter group commenting:

> … these amendments will ensure that there is some existing relationship or connection between the employees and the unions. CCIWA believes that the objectives of the right of entry provisions are best served where there is an established connection between the union and employees to facilitate discussion about matters relevant to the workplace.[63]

2.74 The AMMA also supported the amendment, arguing that the amendment 'is not a significant departure from the status quo' and that:

> … there is almost always a complainant who calls in the union. It was ever thus, and it has always taken an employee with a grievance to bring their workplaces to the attention of trade unions.[64]

2.75 The department further pointed out that since the Fair Work Act changes to the right of entry framework, not only has there been increased visits from unions to workplaces, there have been multiple 'demarcation disputes between unions over coverage of particular workplaces'. The proposed amendment will address both of these issues.[65]

Location of interviews and discussions

2.76 The bill reverses the provision introduced in the *Fair Work Amendment Act 2013* which created a default location – the meal or break room - for meetings between permit holders and employers. Prior to that, and as this amendment seeks to re-establish, occupiers could nominate a designated room for meetings and discussions. Permit holders must comply with this request, unless it was unreasonable (the bill includes some examples of unreasonable requests).[66]

2.77 The ACTU argued that this provision could see employers frustrating the attempts of permit holders and employees to conveniently meet and thus deny workers the opportunity to meet with their union.[67]

2.78 The AWU shared this concern and noted that they are:

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62 Textile, Clothing and Footwear Union of Australia, *Submission 18*, pp 21-22.

63 Chamber of Commerce and Industry of Western Australia, *Submission 15*, p. 10.

64 Australian Mines and Metals Association, *Submission 11*, p. 51.

65 Department of Employment, *Submission 16*, p. 7.

66 Department of Employment, *Submission 16*, p. 10.

67 Australian Council of Trade Unions, *Submission 4*, pp 30-31.

> … aware of many situations in which employers have sought to limit worker and union rights by the choice of meeting area, which is why the Act promotes discussion and an attempt to reach an agreement, but also allows for meetings to occur in the most accessible place for workers, the breakroom.[68]

2.79 ACCI presented in their submission a list of reasons why employers opposed the current provision and would support the proposed amendment:

- there was no cogent evidence provided that suggested that it was necessary to depart from the pre-existing rules regarding interviews and discussions;
- the amendments overturned significant case law which had determined for a variety of reasons, a lunch room is not an appropriate venue for holding discussions or conducting interviews; and
- the amendments violated non-union members right to privacy and also rendered irrelevant employees' right to not participate in discussions (i.e. to enjoy their lunch breaks without being harassed by permit holders).[69]

2.80 The Victorian Hospitals' Industrial Association (VHIA), for instance, drew attention to issues in their experience, noting that the assumption that the meals or break room was the most suitable location for meetings was not necessarily the case in hospitals:

> In the case of a public hospital, it is common that the meal or break room is adjacent to patient areas. Where this is the case, the only means of getting to the meal or break room is to walk through patient areas. That is, the provisions of s 492A of the Act do not assist.
>
> It is also the case that public hospitals will have a range of suitable meeting rooms available away from patient care areas. These may include general meeting rooms and lecture theatres. Such employers will, generally speaking, have several areas that are appropriate for meetings.
>
> It is the view of VHIA that s 492 as it presently is, assumes that the default meeting location is a suitable distance from sensitive work areas and does not take into account the circumstances of employers such as public hospitals.[70]

2.81 Similarly, the National Farmers' Federation (NFF) argued that safety and wellbeing issues are relevant in this matter as well as regarding remote locations:

> There is nothing unreasonable about asking visitors to a workplace to conduct their activities in a particular place, or to take a particular path to

68 Australian Workers' Union, *Submission 5*, p. 4.

69 Australian Chamber of Commerce and Industry, *Submission 16*, p. 24.

70 Victorian Hospitals' Industrial Association, *Submission 10*, p. 5.

> get there. Employers have broad duties to keep both employees and visitors safe in the workplace, and penalties for non-compliance are significant.[71]

2.82 Thus, the evidence suggests that, since it is not always possible or practical for a meal or break room to be used for such purposes, employers should have the flexibility to allocate other rooms for discussions and meetings.

Frequency of visits disputes

2.83 The department's submission notes that changes made to union right of entry provisions in the Fair Work Act resulted in a considerable increase in the number of visits for discussion purposes, which in turn resulted in additional costs to employers.

2.84 The *Fair Work Amendment Act 2013* sought to respond to this problem, giving the Fair Work Commission the power to resolve disputes between unions and employers over frequency of visits, including by suspend, revoke or impose conditions on an entry permit. However, the impact of that amendment was limited since it required the employer to demonstrate that the frequency of visits required a critical diversion of their 'critical resources'.[72]

2.85 The bill amends the FWC's power in this regard further, by removing the 'critical resources' limitation and requiring the FWC to 'take into account the cumulative impact of entries by all union visits to a workplace'.[73]

2.86 Employer groups welcomed the amendment, with ACCI quoting the Productivity Commission's recent report:

> While section 505A of the FW Act enables the FWC to deal with disputes about frequency of entry to hold discussions, orders can only be made where the FWC is satisfied that the frequency requires an unreasonable diversion of the employer's 'critical resources'. In this regard the Productivity Commission has observed:
>
> > In practice, this has proved a high bar. Employers are required to demonstrate that each visit is a critical issue requiring an unreasonable diversion of their resources. This test overlooks the possibility that excessive entries may impose large, unwarranted costs on an employer without necessarily diverting 'critical resources'. Indeed when considering excessive frequency of entries, it would seem more likely that it is the ongoing accrual of the incremental costs of each entry that would be most damaging to employers.[74]

71 National Farmers' Federation, *Submission 2*, p. 4.

72 Department of Employment, *Submission 16*, pp 8-9.

73 Department of Employment, *Submission 16*, p. 9.

74 Australian Chamber of Commerce and Industry, *Submission 14*, p. 23.

2.87 Similarly, AI Group noted that the current provision's 'inclusion of the word 'critical' imposes a test that is virtually impossible to meet' and argued that the proposed amendment was both 'balanced' and 'workable'.[75]

2.88 AMMA supported the amendment on the grounds of the expense and inconvenience caused by 'excessive' union visits to worksites in the resources industry and referred to:

> Undue frequency of union visits is a real issue and some unions have conducted deliberate campaigns against employers by staging hundreds of site visits, on a daily or more than daily basis. The frequency of these visits exceeds any reasonable understanding of how often a union official would need to legitimately enter a workplace to meet with employees.[76]

2.89 By contrast, unions generally disagreed with the amendment, arguing that:

> It is unnecessary, given the broad scope FWC currently has in the resolution of disputes regarding right of entry. It is also significantly broad in scope in its impact on all unions and all permit holders who may seek to exercise statutory entry rights at the one workplace.[77]

2.90 Similarly, the ACTU argued that other mechanisms for dealing with cases of excessive visits already exist:

> These include the broad powers of the [Fair Work] 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.[78]

Committee view

2.91 These provisions enable fair and reasonable entry for unions, ensuring that members can be properly represented, whilst recognising the practical issues that employers must consider, including physical location of meetings and the costs of excessive visits.

2.92 The committee believes that the bill amends the Fair Work Act in relation to union right of entry issues in ways that are sensible and strike a reasonable balance between employees' rights to representation and employers' rights to conduct business without burdensome union right of entry provisions.

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75 AI Group, *Submission 12*, p. 13.

76 Australian Mines and Metals Association, *Submission 11*, p. 39.

77 Textile, Clothing and Footwear Union Australia, *Submission 18*, p. 24.

78 Australian Council of Trade Unions, *Submission 4*, p. 29.

Part 6: FWC hearings and conferences

2.93 Part 6 amends the Fair Work Act in relation to unfair dismissal applications, removing the requirement that the FWC must hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application made under sections 399A or 587. This amendment implements Fair Work Review Panel recommendation 43.[79]

2.94 The amendment introduces the term 'designated application-dismissal power', which describes the powers of the FWC to dismiss unfair dismissal applications. Where the FWC exercises this power, there is no requirement to hold a hearing or conduct a conference. However, in instances where the FWC does not hold a hearing or conduct a conference, the parties must first be invited to provide further information to the FWC that relates to whether the power should be exercised.[80]

2.95 Since the current provision limits the FWC's power to dismiss claims where facts are disputed, however, few claims are dismissed without hearings. The bill seeks to broaden the FWC's capacity to do so, via designated application-dismissal powers.[81]

2.96 The NUW argued that this amendment would:

> … represent a concerning breach of natural justice for workers. It has been a fundamental feature of the unfair dismissal system since its conception that parties are able to be heard prior to the dismissal or termination of an application.[82]

2.97 TCFUA explained that workers in the textile, clothing and footwear industry would be less like to succeed with reasonable claims if they have limited literacy skills and familiarity with the appropriate processes.[83]

2.98 AI Group, on the other hand, described the amendments as 'fair and sensible', Master Builders Australia called them 'sensible' and ACCI, in supporting the amendments, argued that:

> If there is to be any improvement in the level of confidence stakeholders have in the unfair dismissal laws, the process has to leave both parties more satisfied that the merits of their position (or lack thereof) have materially influenced the outcome.[84]

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79 Explanatory Memorandum, p. 21.

80 Explanatory Memorandum, pp 21-22.

81 Department of Employment, *Submission 16*, p. 21.

82 National Union of Workers, *Submission 9*, p. 3.

83 Textile, Clothing and Footwear Union of Australia, *Submission 18*, p. 25.

84 Australian Chamber of Commerce and Industry, *Submission* 14, p. 29.

2.99 The National Farmers' Federation (NFF) supported the amendments and argued that the FWC should also be granted power to dismiss unfair dismissal appeals, 'which are increasingly common and rarely successful'.[85]

Committee view

2.100 The committee is of the view that the amendment contained in this provision of the bill is sensible, moderate and will serve to make the FWC more efficient in its handling of unfair dismissal claims.

2.101 The committee notes that this amendment furthers the previous government's policy of empowering the FWC to consider unfair dismissal claims without the expense and inconvenience of a hearing. Further, the committee is unpersuaded by the suggestion that employees will be disadvantaged compared to employers as a consequence of this amendment.

Recommendation 1

2.102 The committee recommends that the Senate pass the bill.

Senator Bridget McKenzie

Chair, Legislation

85 National Farmers' Federation, *Submission 2*, p. 5.