Ai GROUP SUBMISSION

Inquiry into the provisions of the Fair Work Amendment (Remaining 2014 Measures) Bill 2015

Senate Education and Employment Legislation Committee

22 December 2015

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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Summary

This submission is made by the Australian Industry Group (**Ai Group**) to the Senate Education and Employment Legislation Committee inquiry into the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

The Bill is an important step in the right direction in implementing the necessary changes to the *Fair Work Act 2009* (Cth) (**FW Act**).

The amendments proposed by the Bill were initially included within the *Fair Work Amendment Bill 2014* (Cth) but were removed from that Bill by the Senate. Ai Group supported these amendments when they were introduced as part of the earlier Bill and was disappointed that they were removed.

The amendments are sensible and consistent with key recommendations of the 2012 Fair Work Act Review.

The amendments are largely technical in nature and respond to areas of confusion or inconsistency within the *Fair Work* system. They are important to restore the necessary balance between stakeholders in the employment relationship, and are integral for harmonious and productive workplace relations at the enterprise level.

The Bill addresses a number of important issues, including:

- Tightening union entry rights, including overturning the recent amendments to the Act which gave union officials an absolute right to hold their meetings in lunchrooms regardless of whether or not any union members are employed in the business. These amendments were made despite the fact that the 2012 Fair Work Act Review had recently reviewed the right of entry provisions and rejected union submissions that entry rights should be expanded.

- The implementation of several important recommendations made by the 2012 Fair Work Act Review, including amendments to:

    - Make Individual Flexibility Agreements (IFAs) more workable and fairer for individual employees and their employer;

    - Clarify leave accruals during periods of workers' compensation;

    - Clarify the payment of annual leave loading on termination of employment;

    - Amend the transfer of business laws to enable employees to transfer voluntarily to a related company of their current employer without the industrial arrangements of each employer being disturbed.

The Bill, with the amendments proposed in this submission, should be passed without delay and then followed up with more substantial changes to the FW Act to implement a more flexible and productive workplace relations system.

Our views on the specific amendments proposed in the Bill are set out in the following table.

Provisions of the Bill	***Position***	***Comments***
Schedule 1 – Amendments		
<u>Part 1 – Payment for annual leave</u> **Items 1, 2 and 3** Untaken paid annual leave to be paid at a rate not less than the base rate, but awards and enterprise agreements may provide for a higher rate	**Supported**	This is a very important amendment that is consistent with Recommendation 6 of the 2012 Fair Work Act Review. The amendment addresses a major issue of concern for employers which has arisen due to a problem with the drafting of s.90 of the FW Act. Section 90 specifies how annual leave is paid to an employee during a period of annual leave (s.90(1)) and on termination (s.90(2)). The decision of the Full Federal Court in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 100 has interpreted s.90(2) of the FW Act in a manner which conflicts with the apparent intention of the Act, and conflicts with Recommendation 6 of the 2012 Fair Work Act Review. The Court decided that s.90(2) of the FW Act is to be interpreted to mean that annual leave on termination of employment is to be paid at a rate which reflects the amount that would have been payable to the employee if the annual leave had been taken. In many cases this will be a higher rate than the base rate of pay, e.g. if the employee is entitled to leave loading or a car allowance during a period of annual leave that is taken. The Federal Court's decision means that the provisions in many awards and enterprise

Provisions of the Bill	*Position*	*Comments*
		agreements which specify that leave loading is not payable on termination of employment will generally be invalid and inoperative (although the specific terms of any provision would need to be considered). The Bill addresses the problems by clarifying that an employer must pay an employee on termination not less than the base rate of pay for the employee's untaken annual leave. As presently applies, modern awards and enterprise agreements are able to supplement the minimum standard in s.90 and require that additional payments such as leave loading be paid.
<u>Part 2 – Taking or accruing leave while receiving workers' compensation</u> **Item 4** Restriction on taking or accruing leave under the NES while on workers' compensation	**Supported**	This is a very important amendment that is consistent with Recommendation 2 of the 2012 Fair Work Act Review. Section 130 of the FW Act has caused a great deal of confusion for employers. Subsection 130(1) is clear and appropriate. It provides that an employee is not entitled to take or accrue any leave or absence under the NES during a workers' compensation period (e.g. annual leave under Division 6 of Part 2-2 and personal / carer's leave under Division 7 of Part 2-2). However, existing s130(2) in the FW Act is unclear and inappropriate, and should be repealed as reflected in Item 5 of the Bill. Subsection 130(2) provides that unless an employee is "permitted" to accrue or take any of the forms of leave under the NES during a workers' compensation absence then the employee is not entitled to do so. Recently, the Full Federal Court in *Anglican Care v NSW Nurses and Midwives' Association* [2015] FCAFC 81 interpreted s.130 in a problematic manner for employers.

Provisions of the Bill	***Position***	***Comments***
		The arguments in the case revolved around the meaning of the word "permitted" in s.130(2). Prior to this Full Federal Court decision, Ai Group, the FWO and most other parties interpreted s.130(2) to mean that where the relevant workers' compensation legislation is silent on leave accruals, then leave does not accrue. The basis for this interpretation was a series of Court and Commission decisions interpreting the word "permits" in other legislative provisions to mean expressly permitting or authorising, not simply being silent on the relevant issue. For example see *The Australian Industry Group v ADJ Contracting* [2011] FWAFB 6684 at paragraph [28]. In the *Anglican Care* case, the Court interpreted s.130 of the Act to mean that an employee is entitled to accrue annual leave or personal/carer's leave under the NES unless the relevant State, Territory or Commonwealth workers' compensation law expressly states that such leave does not accrue. None of the workers' compensation laws expressly state that leave does not accrue during a workers' compensation absence and therefore the Court has decided that leave accrues. The Federal Court's decision conflicts with the apparent intention of the FW Act, and conflicts with Recommendation 2 of the 2012 Fair Work Act Review. The repeal of s.130(2) is sensible and appropriate. There are many cases where employees remain on workers' compensation for a number of years and it would not be appropriate or consistent with longstanding and widespread industry practice for annual leave etc to accrue during this period.

Provisions of the Bill	*Position*	*Comments*
Part 3 – Individual flexibility arrangements **Division 1 – Modern awards (genuine needs statements)** **Item 5** Genuine needs statements	**Amendment proposed**	The proposed s.144(4)(c) would have the effect of requiring an individual flexibility arrangement (IFA) to include a genuine needs statement by the employee. Given that each IFA must be signed by the employer and the employee, the requirement that *"any individual flexibility agreement includes a statement"* (presumably signed only by the employee) is likely to confuse employers and employees. We suggest that s.144(4)(c) be reworded to make it clear that an IFA must be accompanied by a genuine needs statement, rather than the statement necessarily being included in the IFA.
Division 2 – modern awards (other matters) **Item 6** Extension of the maximum notice period for termination of an IFA from 28 days to 90 days.	**Supported**	This amendment is consistent with Recommendation 12 of the 2012 Fair Work Act Review and the decision of a Full Bench of the FWC in the Modern Award Review 2012 *Award Flexibility Case* ([2013] FWCFB 2170).
Item 7 Non-monetary benefits and the better off overall test	**Supported**	The Explanatory Memorandum for the *Fair Work Bill 2008* makes it clear that the policy intent with IFAs is to allow non-monetary benefits to be taken into account when determining whether an employee is better off overall (e.g. see the Illustrative Example after paragraph 867 in the EM). The inclusion of the Note in the Act clarifies this intent and avoids any doubt.
Items 8 and 9 Statutory defence regarding contravention of flexibility term by employer	**Supported**	The statutory defence in s.145AA is fair and reasonable and does not detract from the high level of protection afforded to employees under the Act.

Provisions of the Bill	*Position*	*Comments*
Division 3 – Enterprise agreements **Items 10 and 11** Ensuring that enterprise agreements provide meaningful flexibility for an employee and an employer to enter into an IFA	**Supported**	At the present time, unions are routinely refusing to sign enterprise agreements unless the flexibility term blocks any meaningful flexibility through an IFA. These items in the Bill address this problem by ensuring that IFAs provide meaningful flexibility in the areas set out in the FWC's Award Flexibility Term and set out in the Model Flexibility Term in Schedule 2.2 of the *Fair Work Regulations 2009*.
Item 12 Non-monetary benefits and the better off overall test	**Supported**	See Item 7 above.
Item 13 Genuine needs statements	**Amendment proposed**	See Item 5 above.
Item 14 Extension of the maximum notice period for termination of an IFA from 28 days to 90 days.	**Supported**	See Item 6 above.
Items 15 and 16 Statutory defence regarding contravention of flexibility term by employer	**Supported**	See Items 8 and 9 above.
Item 17 Termination period for an arrangement that does not meet requirements of flexibility term	**Supported**	This is a sensible amendment.

Provisions of the Bill	*Position*	*Comments*
<u>Part 4 – Transfer of business</u> **Items 18, 19 and 20** Transfer to an associated entity at the employee's initiative	**Supported**	The existing transfer of business laws operate as a major disincentive to employers allowing employees to transfer between associated entities. Many companies are part of a broader corporate group with a variety of employing entities. Employees often seek redeployment to different parts of their employer's business to, for example, obtain promotions or assignments overseas, to gain skills, or to work with different technologies. Australia's workforce is increasingly mobile both locally and globally. Under the current transfer of business laws, employees who seek redeployment to another entity within a corporate group for the purposes of career progression or broader experience risk having the opportunity stymied because any enterprise agreement applicable to the employee's employment with the original entity would become binding upon the other entity creating potentially widespread consequences for the business. The transfer of business laws limit the redeployment opportunities of employees and consequently increase the number of employees who are made redundant. In many cases, the disruption associated with allowing an employee to transfer to another business in the corporate group is too great for an employer to allow the transfer to occur and therefore the workers are made redundant. The following case study was provided by an Ai Group Member company and submitted to the 2012 Fair Work Act Review:

Provisions of the Bill	*Position*	*Comments*
		Case study *"We decided to transfer machinery from one operating company to another within our corporate group. Both of the relevant sites had different enterprise agreements due to different ownership histories.* *The team of employees which operated the machinery wanted to transfer to the other company but given that the enterprise agreement would transfer across, we were not prepared to take the industrial risk.* *On this occasion the employees were retrained and redeployed within the first company due to a timely expansion in our operations, but this would not have ordinarily been possible and retrenchments would have been necessary.* *The detailed knowledge and experience of the machine operators remained at the wrong site and the company had to hire and train from scratch, resulting in inefficiencies and higher costs.* *The uncertainty and general frustration saw the loss a couple of experienced machine operators."* The amendments to section 311 and 768AD would be beneficial and are consistent with Recommendation 38 of the 2012 Fair Work Act Review.
<u>Part 5 – Right of entry</u> **Items 21, 23, 24, 33 and 34** Accommodation arrangements and transport arrangements	**Supported**	These Items reverse the inappropriate right of entry changes introduced through the *Fair Work Amendment Bill 2013* regarding accommodation arrangements and transport arrangements.

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		The provisions in the FW Act require employers to provide accommodation and transport to union officials in remote locations for the purpose of conducting interviews and holding discussions with employees. Where the employer and the permit holder cannot agree the employer or occupier must enter into an accommodation and/or transport arrangement with the permit holder, and the employer or occupier is responsible for the cost of the accommodation and/or transport. The provisions in the FW Act remove any incentive for the permit holder and the organisation of which the permit holder is an official to negotiate a sensible accommodation and/transport arrangement which suits all parties, including the employer.
Item 25 Entry to hold discussions with employees	**Supported**	These provisions are fair and appropriate. They largely restore arrangements which operated successfully prior to the introduction of the FW Act. A union official would have the right to enter premises to hold discussions with employees who are eligible to be a member of the union and who wish to participate in the discussions, in the following circumstances: • If the union is covered by an enterprise agreement which applies to work performed on the premises; or • If a member or prospective member of the union has invited the union to send a representative to the premises to hold discussions with the employees.
Items 26, 27 and 28 Conduct of interviews in a	**Supported**	These Items reverse inappropriate right of entry changes introduced through the *Fair*

Provisions of the Bill	***Position***	***Comments***
particular room etc FWC may deal with a dispute about whether a request is reasonable		*Work Amendment Bill 2013.* The changes to the FW Act removed an employer's right to reasonably request that interviews be conducted and discussions held in a particular area of the workplace. There is currently no incentive for unions to enter into sensible discussions with employers about a reasonable location for union meetings. Under the FW Act, union officials now have the right to conduct union meetings in lunchrooms. This is not appropriate or fair. Lunchrooms (and other break areas) are used by all employees, including those who are not union members and those who do not wish to participate in union discussions. Only a minority of employees are union members, about 13 per cent in the private sector. Under the provisions in the Bill, and the provisions which operated prior to 1 January 2014, unions would have the right to challenge the location proposed by the employer in the FWC if they regard the location as unreasonable. There have been very few disputes about this issue over the years because employers typically are reasonable.
Items 27, 28 and 29 FWC may deal with a dispute about frequency of entry to hold discussions	**Supported**	These provisions are appropriate. The statutory test in s.505(4) of the FW Act, which was inserted from 1 January 2014 as a result of the *Fair Work Amendment Act 2013*, requires the employer to explain how the frequency of visits of the permit holder would be an unreasonable diversion of the

Provisions of the Bill	*Position*	*Comments*
		occupier's "critical resources". The inclusion of the word 'critical' imposes a test that is virtually impossible to meet. The provisions in the Bill are more balanced and workable.
Items 22, 31, 32 and 35 Invitation certificates	**Supported**	These provisions are balanced and appropriate.
Part 6 – FWC hearings and conferences **Items 36, 37, 38, 39, 40, 41 and 42**	**Supported**	These provisions are fair and sensible.
Schedule 2 – Application and transitional provisions		
Items 1 to 10	**Supported**	We have not identified any problems with these provisions.

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