

CHAPTER 2

Introduction

2.1 The Committee received extensive evidence about the proposals set out in the Bill, as a legislative response to outstanding Fair Work Review Panel recommendations. Further, evidence provided at the public hearing in Canberra focussed on three issues of key concern: Individual Flexibility Arrangements, Greenfields agreements and unclaimed monies.

Part 1: Extensions of periods of unpaid parental leave

2.2 Part 1 of Schedule 1 proposes to amend section 76 of the *Fair Work Act 2009* (FWA) to provide that, 'an employer must not refuse a request for extended unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request.'¹ The explanatory memorandum states this amendment would implement recommendation 3 of the Fair Work Review Panel; noting:

What constitutes a reasonable opportunity to discuss the request is not defined, however, it is intended that a discussion by telephone or other electronic means such as digital video conferencing will satisfy the requirements of new subsection 76(5A). Conversely, it is not intended that communication by text-based means such as email or short message service (SMS) will satisfy the requirements of new subsection 76(5A).²

2.3 The Committee received evidence from numerous submitters, including employer and employee organisations, who argued the amendments proposed in Part 1 were unnecessary and poorly structured. The Australian Chamber of Commerce and Industry (ACCI) argued that while the amendment in Part 1 largely reflects recommendation 3 of the Review Panel Report:

Moreover, there is a deeper issue here which arises from the unstated presumption that legislating practices which are already widespread imposes little or no cost on complying employers and it only changes the practices of currently non-complying employers.

This presumption is wrong on two counts. First, regulation imposes compliance obligations, such as record keeping and other evidence requirements, because of possible third party review and the need to be prepared to defend against an alleged contravention. This cost is imposed on complying employers, not non-complying employers.

Second, the more complicated and costly regulation makes it to employ people the greater the push to informality and the black economy. Unnecessary regulation is to be avoided.³

1 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 2.

2 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 2.

3 Australian Chamber of Commerce and Industry, *Submission 28*, pp 9 – 10.

2.4 The Australian Council of Trade Unions (ACTU) submitted they support the requirement for a meeting to discuss an employer's decision not allowing extensions of unpaid parental leave. However, they submitted that the right to make a request must be accompanied with a right of review, to ensure 'that requests for flexible working arrangements are given proper consideration and that a refusal is indeed due to reasonable business grounds'.⁴

2.5 The Department of Employment's (the Department) submission notes the Bill will require employees to provide a reasonable opportunity to discuss extensions of up to 12 months unpaid parental leave before the leave can be refused, noting:

The amendment was recommended by the Fair Work Act Review 2012 in recognition of the experience of some employees having requests refused without due consideration. A meeting will not be required if the employer agrees to the request. The Explanatory Memorandum notes that the discussion does not need to be face to face but can occur by other means, for example via telephone or video conference.⁵

2.6 Further, the Department's submission argues the National Employment Standards would continue to provide employees with return to work guarantees and the Regulation Impact Statement estimates that the impact of these changes would be minimal:⁶

Data from a survey undertaken by the Fair Work Commission in 2012 was that, since 1 January 2010, only 1.5 per cent of employers had received such a request, and of them more than 95 per cent agreed to the request. This means that less than 5 per cent of employers who receive a request for extended unpaid parental leave will be affected by the changes.⁷

Committee view

2.7 The Committee is persuaded by evidence presented by submitters and witnesses that on balance, the amendments proposed in Part 1 will impose a minimal burden on employers while providing a significant benefit to employees wishing to extend their parental leave.

2.8 The Committee does not agree with suggestions that the amendments would impose an inappropriate regulatory burden, noting while the data collected by the Fair Work Commission indicated that only 1.5 per cent of employers had received such requests, meetings are only required when the extension request is not agreed to by both parties.

4 Australian Council of Trade Unions, *Submission 14*, p. 2.

5 Department of Employment, *Submission 14*, p. 21.

6 Department of Employment, *Submission 14*, p. 21.

7 Department of Employment, *Submission 14*, p. 22.

Part 2: Payment for annual leave

2.9 Part 2 would provide, through changes to section 90 of the FWA, that if employees have untaken paid annual leave at the time of termination or resignation:

- the employer must pay the employee an hourly rate for each hour of paid annual leave that the employee has accrued and not taken; and
- that hourly rate must not be less than the employee's base rate of pay that is payable immediately before the termination time.⁸

2.10 The explanatory memorandum notes:

The amendment restores 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. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.⁹

2.11 The amendments contained in Part 2 implement recommendation 6 of the Fair Work Review Panel.¹⁰

2.12 The amendments contained in Part 2 were both supported and criticised, with some submitters arguing it would lead to a loss of entitlements, and create an incentive for employees to take their annual leave before resigning. Other submitters argued the amendment gives effect to the Fair Work Review Panel's intention of standardising provisions relating to leave loading entitlements across various awards.

2.13 Mr Tim Lyons, Assistant Secretary of the ACTU, detailed the ACTU's concerns with respect to amendments in Part 2, arguing that it would result in a reduction of conditions available to employees and create several perverse outcomes. Specifically:

The first is that it will say to employers, 'You shouldn't give people their annual leave to take, because, if they leave, you'll actually get it cheaper, because you won't have to pay the annual leave loading.' Secondly, it will create an obligation on us as unions to advise workers not to resign and have their annual leave paid out if they are going to a new job but, first of all, to take their leave, have it paid at full freight and then resign, resulting in an effect where, when an employee is leaving, the best thing for them to

8 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 3.

9 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 3.

10 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 2.

do personally to get their money is, in effect, to not be honest with the boss about whether or not they are going to leave.¹¹

2.14 Australian Industry Group (Ai Group) argued that Part 2 addresses inconsistencies and deficiencies with respect to the current operation of section 90 of the FWA.¹² Ai Group also argued that the inconsistency and confusion about the provision was reflected in inconsistent rulings by the Fair Work Commission:

Item 4 in 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. This is clarified in Item 3 of the Bill and in the note in Item 4 of the Bill.¹³

2.15 The Department stated in the hearing that the Bill restored the historical position with respect to annual leave loading, that it is not payable on termination unless specifically allowed for by an award or agreement.¹⁴ The Department's submission noted:

The Bill will implement recommendation 6 of the Fair Work Act Review 2012, restoring the longstanding position that on termination of employment accrued untaken annual leave is paid at the employee's base rate of pay and leave loading is payable if it is provided for by the relevant instrument. Restoring the longstanding position would provide certainty and clarity to employers and employees and avoid disputes that have arisen as a result of differing interpretations of the provision.¹⁵

Committee view

2.16 The Committee is persuaded by the evidence indicating the amendments in Part 2 are appropriate and necessary in addressing the confusion around annual leave loading payments on termination. The Committee is particularly persuaded by evidence that the mischief (in this case, inconsistent payment of annual leave loading) is appropriately targeted by the amendments in Part 2 as suggested by the Fair Work Review Panel.

11 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 1.

12 Ai Group, *Submission 23*, p. 5.

13 Ai Group, *Submission 23*, p. 6.

14 Dr Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 12.

15 Department of Employment, *Submission 14*, p. 22.

Part 3: Taking or accruing annual leave while receiving workers' compensation

2.17 The Committee received evidence from numerous submitters relating to the changes proposed by Part 3, largely agreeing that the unequal treatment of employees on workers' compensation under Commonwealth, State and Territory workers' compensation legislation requires attention.

2.18 Part 3 would repeal subsection 130(2) of the FWA, providing that an employee who is absent from work and in receipt of workers' compensation payments, will not be able to take or accrue annual leave under the FWA during the compensation period. This clause would implement recommendation 2 of the Fair Work Review Panel and would also ensure that national system employees will have the same entitlements in relation to the accrual and taking of leave while absent from work and receiving workers compensation, regardless of the particular compensation law that applies to them.¹⁶

2.19 The Department notes the inconsistent treatment of employees under section 130 of the FWA, as employees are not entitled to take or accrue any leave while absent from work and in receipt of workers' compensation, unless permitted by applicable Commonwealth, State or Territory legislation:

This has led to the inconsistent treatment of employee entitlements across Australia. For instance, employees in the Queensland and Commonwealth systems who are absent from work on workers' compensation can accrue annual, personal and long service leave, while employees in other jurisdictions cannot.¹⁷

2.20 The ACTU criticised the inclusion of Part 3 in the Bill, arguing it was an example of overreach because it was not explicitly suggested by the Fair Work Review Panel. The ACTU submitted:

...the Panel recommendation did not extend to prohibiting taking annual leave while on workers' compensation, only accruing it. It should also be recalled that even Work Choices did not go this far: it allowed annual leave to be taken and accrued unless the relevant workers' compensation law prohibited it. This meant that workers in most jurisdictions were able to take and accrue annual leave. The current s 130(2) modified the position under Work Choices by requiring that the relevant workers compensation law expressly permit the taking and accruing of leave.¹⁸

2.21 Other submitters, including ACCI, were strongly supportive of the changes, arguing the amendments would remove the uncertainty relating to whether employees

16 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 4.

17 Department of Employment, *Submission 14*, p. 21.

18 ACTU, *Submission 20*, p. 7.

in States and Territories who are in receipt of workers' compensation are entitled to accrue or take leave, given the inconsistent treatment of workers' compensation across Australia.¹⁹

2.22 The Committee is not persuaded by the argument that the proposed workers' compensation changes are an overreach or represent an attempt to remove the entitlements of workers. Further, the Committee agrees that entitlements relating to the accrual and taking of annual leave while in receipt of workers' compensation are appropriately addressed by the Bill, and that any outcome that limits the ability of employees receiving workers' compensation to take or accrue annual leave is consistent with the approach in State and Territory legislation.

Part 4: Individual flexibility arrangements (IFA)

2.23 The amendments in Part 4 address recommendations 9, 11, 12 and 24 made by the Fair Work Review Panel and are intended to provide clarity and certainty for employers and employees, whilst maintaining the protections in the Act, IFAs cannot exclude the National Employment Standards.

2.24 The explanatory memorandum notes that under the FWA, every modern award and enterprise agreement must contain a flexibility term that:

...allows an employer and an individual employee to make an individual flexibility arrangement that varies the effect of certain terms of the modern award or agreement, as between them, to meet their genuine needs.²⁰

An individual flexibility arrangement must, amongst other things:

- set out the terms of the modern award or enterprise agreement that are to be varied in their effect;
- be genuinely agreed to by the employer and the employee;
- result in the employee being better off overall than if no individual flexibility arrangement were in place; and
- be signed by both the employer and employee (and a parent or guardian of the employee in the case where the employee is under 18 years of age).²¹

Genuine needs statements

2.25 Item 6 changes the requirements of flexibility arrangements to include statements by the employee setting out why they believe the agreement meets their genuine needs and results in them being better off overall:

Requiring these matters to be put into writing ensures that both the employer and employee consider these requirements before agreeing to an

19 Australian Chamber of Commerce and Industry, *Submission 28*, p. 15.

20 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 4.

21 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 4.

individual flexibility arrangement. This statement could be used 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 (inserted by item 10). The genuine needs statement is intended to provide additional safeguards for both employers and employees.²²

IFA requirements

2.26 Division 2 sets out the requirements as to how IFAs made under the term may be terminated by the employer and employee:

New paragraph 144(4)(d) provides that a flexibility term in a modern award must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated by either the employer or employee giving written notice of 13 weeks (subparagraph 144(4)(d)).²³

2.27 The explanatory memorandum notes the amendment is consistent with the decision of a Full Bench of the FWC in Modern Awards Review 2012 – Award Flexibility [2013] FWCFB 2170 (15 April 2013), that extended the notice period for unilateral termination of IFAs from four to thirteen weeks.²⁴

2.28 The formalisation of the minimum notice period for unilateral termination of IFAs addresses the current inconsistency between requirements for modern award and enterprise agreement flexibility terms. The amendment would ensure the notice period for unilateral termination of IFAs will remain consistent. The explanatory memorandum argues the amendments in Part 4 respond to Fair Work Review Panel recommendation 12.

Better off overall legislative notes

2.29 Item 8 would confirm the requirement that an individual's IFA must leave the employee better off overall. The explanatory memorandum notes this would respond to recommendation 9 of the Fair Work Review Panel, by expressly permitting an IFA to confer non-monetary benefits in exchange for monetary benefits:

This does not change the protections that apply in respect of individual flexibility arrangements. Rather, the legislative note is intended to provide clarity and certainty to employers and employees.

...

It is expected that the subjective preferences of the employee would be relevant in assessing the relative value of benefits.

22 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 5.

23 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 5.

24 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, pp 6 – 13.

...

Individual flexibility arrangements are intended to facilitate arrangements that meet the parties' genuine needs. Therefore, in considering whether an individual flexibility arrangement leaves an employee better off overall, the employee's views and preferences will be relevant, as will those of the employer.²⁵

2.30 Item 10 provides for a new clause 145AA, creating a defence to an alleged contravention of flexibility term, so long as the employer's belief was that they had, 'complied with the requirements, based on the facts and circumstances in existence at the time of making the individual flexibility arrangement, [and] was reasonable.'²⁶ The genuine needs statement (inserted by Item 6, above) would be available as evidence of the employee's state of mind at the time that the IFA was made and agreed to.²⁷

Enterprise agreements

2.31 Items 11 to 15 respond to numerous recommendations by making substantive changes to conditions under which IFAs may be made, including:

- work performance hours;
- overtime rates,
- penalty rates;
- allowances; and
- leave loading.²⁸

2.32 These items also clarify aspects of the better off overall tests, by inserting legislative notes into the FWA to assist with the interpretation of conditions of IFAs. These provisions address recommendations 9, 11, 12 and 24.

2.33 Some submitters argued the proposed changes have the potential to create significantly detrimental effects on workers by removing safeguards and enabling employers to bargain from a position of advantage to effectively drive down wages and conditions. Specifically, concerns were raised that the proposed changes to IFAs risk entitlements such as minimum wages and penalty rates.

2.34 The ACTU argued the proposed changes to IFAs would result in 'pizza for conditions' provisions, and result in a situation where employees can trade away core entitlements for non-monetary benefits.²⁹

25 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 7.

26 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 8.

27 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 9.

28 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, pp 9 – 13.

29 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 2.

2.35 In response to these concerns, the Department stated:

Ms Kuzma: Yes. Individual flexibility arrangements can be made within the matters in a flexibility term, which are in awards and enterprise agreements. You can only make an IFA about one of those things. A minimum wage is not ordinarily one of those things. The model flexibility term for, say, enterprise agreements is about arrangements when work can be performed, overtime rates, penalty rates, allowances and leave loading. In that circumstance, if you have that term you would not be able to make an IFA about that.³⁰

Non-monetary compensation

2.36 A related concern among submitters was the issue of non-monetary benefits being assessable with respect to the better off overall test. The Committee notes the prevailing view among employee organisations that trading monetary entitlements such as penalty rates for non-monetary compensation such as the flexibility to work certain days or hours that best suit personal needs, cannot meet the better off overall test.

2.37 Concerns were raised that in allowing the trade of monetary compensation for non-monetary compensation, the employee may be stripped of protections that were previously offered under the FWA. The ACTU stated:

Tim Lyons: But we have the Fair Work Commission. I understood it was government policy to support its right to determine, as the independent umpire, what the penalty rate was. It has decided it is whatever for Sunday and these IFAs enable, with a bulletproof defence, an employer to undermine those and strip those away. You cannot, in our submission, have it both ways here: you cannot have the Fair Work Commission set the penalty rates and then enable these things to effectively undermine a merits based decision about what you should get paid to work on the weekends or at night, for example.³¹

2.38 The Department explained in its opening statement that the Bill inserts legislative notes confirming that non-monetary benefits can be taken into account when determining whether an employee is better off overall:

This note does not change the existing law but simply confirms that this is how it is intended to operate. Non-monetary benefits have always been able to be taken into account in considering whether an employee is better off overall under an IFA.

There is a new requirement that individual flexibility arrangements include a statement made by the employee setting out how the arrangement meets

30 Ms Janey Kuzma, Senior Executive Lawyer, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 16.

31 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 8.

the employee's genuine needs while ensuring they are better off overall. This will be of particular relevance where non-monetary benefits are involved. It adds an additional protection for employees and will further assist in clarifying the operation of this provision of the act.³²

2.39 During the hearing, the Committee put a number of questions to the witnesses in an attempt to clarify whether the Bill will result in changes to the current regulatory framework that would result in workers being worse off. The Department said:

Dr Morehead: These changes that we have discussed are not altering what the current situation is—that is, the situation created under the previous government by way of legislation in terms of the issues raised by Mr Lyons et cetera and in this conversation now to do with the ability to trade off penalty rates. It seems to be something that people like to say, but we are just try to make clear that nothing has changed in that regard.

...

What we were saying then was that there are not changes in terms of 'better off overall' tests—no changes. In terms of protections for employees—no changes. In terms of going further than the election commitments—no changes. In terms of can you trade off a penalty rate under an individual flexibility arrangement if it makes you better off overall—no changes.³³

Imbalance of power

2.40 Submitters raised issues of the differences in the balance of power between employer and employee that could lead to an employee being worse off. The ACTU suggested employees will be at a disadvantage in IFA negotiations for several reasons including because:

- (a) an employee can trade off anything;³⁴
- (b) an employer has no obligation to publish the agreement;³⁵
- (c) the capacity of the FWO to check on agreements has been removed;³⁶
and
- (d) the employer can terminate the agreement with 13 weeks' notice to get out of the arrangements.³⁷

32 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 12.

33 Dr Alison Morehead, Group Manager, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 15.

34 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 2.

35 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 2.

36 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 4.

2.41 As stated previously, the Bill provides that it is the employee's choice to seek an IFA, and that one cannot be forced upon an employee by an employer. Further, there is no suggestion that unions are excluded from the process or that agreements are kept secret. In making an IFA, the employer is required to give a copy to the employee. The employee may also terminate the agreement with 13 weeks' notice.

2.42 The Community and Public Sector Unions (CPSU) criticised the amendments that would affect the range of matters that can currently be considered in IFAs:

Currently the *Fair Work Act* allows parties to bargaining to negotiate the terms of the IFA clause that will be inserted into the enterprise agreement. This allows parties to consider what individual flexibilities may be appropriate to employees and the enterprise, and craft the individual flexibility clause of the enterprise agreement to suit those purposes.

The Bill proposes amendments to the Act that would require IFA clauses in enterprise agreements to cover a minimum range of matters in flexibility clauses. That is, parties do not have discretion to decide which matters may be subject to future IFAs.³⁸

2.43 The Department explained that enterprise agreements can currently restrict IFAs to a single specified matter:

This means that, at one workplace, an employee might only be allowed to make an IFA about penalty rates but if they were with another employer they might only be allowed to make an IFA about leave loading. It doesn't make much sense and is different again if you work under an award. For awards, there is a standard clause specifying five matters that can be included in an IFA. The Bill will ensure that, as a minimum, IFAs, made under an agreement or an award, may deal with the five specified matters.³⁹

2.44 The Department clarified numerous misunderstandings with respect to the Bill including that employees could trade away minimum standards guaranteed by the National Employment Standards:

It is important to note that you cannot make an IFA which contracts out of your entitlements under the National Employment Standards. You cannot trade those away. The way that works is that those things are separately enforceable. An IFA changes the term of your enterprise agreement or your award but, quite separately, you can enforce your NES entitlements. You cannot trade those away.⁴⁰

37 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 8.

38 Community and Public Sector Union, *Submission 2*, p. 2.

39 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 12.

40 Ms Janey Kuzma, Senior Executive Lawyer, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 16.

Committee view

2.45 The Committee is persuaded by the evidence provided by the Department that the proposed changes to IFAs are an appropriate and reasonable response to the original issue raised by the Fair Work Review Panel. The Committee is satisfied that Part 4 as drafted would have the effect of addressing recommendations 9, 19, 20 and 23 of the Fair Work Review Panel.

Part 5: Greenfields agreements

2.46 The Committee heard extensive evidence from witnesses and submitters about the effect of the changes proposed in Item 5 of the Bill, that provide for a new process for efficient negotiation of single-enterprise Greenfields agreements. Some submitters, including some employee organisations criticised some of the measures in Part 5, arguing the amendments would allow employers to commence bargaining procedures implemented by clause 178B and would in effect 'count down' the clock to circumvent a proper bargaining process. Other witnesses and submitters rebutted these claims, arguing the inclusion of the 'good faith bargaining' provisions, together with the review process outlined would prevent anything other than genuine good faith negotiations from taking place.

2.47 The Regulation Impact Statement, provided in the Explanatory Memorandum notes:

Greenfields agreements are a form of enterprise agreement that can be made under the *Fair Work Act* before any employees have been engaged at a new enterprise. They are extensively used in large scale construction and resources projects. They must be made between the prospective employer and a union or unions that are able to represent a majority of employees who will be covered by the agreement.⁴¹

2.48 The Regulation Impact Statement also details that having Greenfields arrangements in place for large projects can be essential in securing finance and other approvals, due to the agreement providing a degree of certainty with respect to labour costs and by limiting exposure to industrial action. The Committee notes the figures provided by the Business Council of Australia to the Fair Work Review Panel, arguing capital projects underway, under consideration or planning, worth over \$912 billion dollars.⁴²

2.49 The Committee notes findings of the Fair Work Review Panel report that existing provisions conferred significant capacity on a union or unions (with coverage

41 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, at Regulation Impact Statement, p. ix.

42 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, at Regulation Impact Statement, p. ix.

of a majority of prospective workers) to frustrate and delay the making of appropriate Greenfields agreements in a timely way:

Unions in this position are able to withhold agreement and effectively prevent the determination of terms and conditions in advance of a project commencing. In light of the evidence we were presented about the need for certainty over the labour costs associated with major projects, we are concerned at the risk of delays in greenfields agreement making that this entails.⁴³

43 Fair Work Review Panel Report, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, pp 171-172.

2.50 The explanatory memorandum provides a diagram to explain how the new process would function in practice, as below:

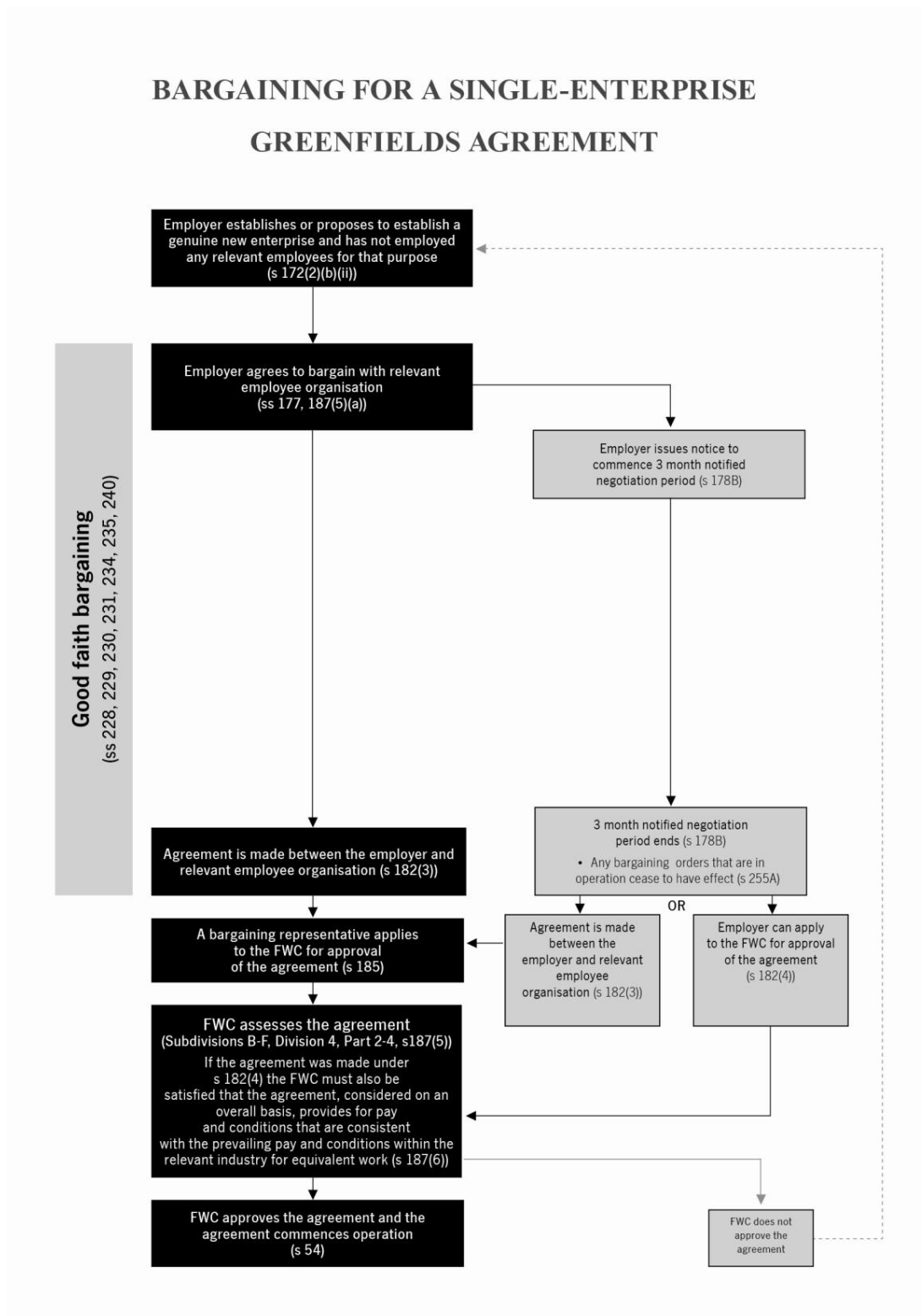


Figure 1 - Explanatory Memorandum, p. 15.

Concerns of submitters

2.51 Employee organisations, such as the ACTU and the Maritime Union of Australia (MUA) criticised the inclusion in the Bill of provisions providing for single enterprise agreements, arguing employers would be able to 'run down the clock' and not have to engage in appropriate bargaining under the proposed changes.

2.52 The MUA noted the application of the amendments in Part 5 as providing for good faith bargaining requirements would apply to single enterprise Greenfields agreements and that employers may unilaterally give notice of a notified negotiation period of three months. This was referred to in the hearing as the starting period from which employers could run down the clock. The MUA's concerns were shared by others:

The consequences of these amendments are that at the end of the three month negotiation period, the employer can apply to the Commission for the approval of the agreement, without the agreement of any of the other bargaining representatives and the agreement will be considered to have been made with the organisations who were bargaining and it will cover and apply to them regardless of their opinions relating to the agreement.⁴⁴

2.53 The ACTU argued in their submission that the Bill would see a return to a situation under the previous *Workplace Relations Act 1996*, where employers could reach unilateral agreements about the terms and conditions of employment.⁴⁵ Their submission notes four recommendations of the Fair Work Review Panel, including Recommendation 27, that would require good faith bargaining requirements to apply to the negotiation of Greenfield agreements:

The EM notes that greenfields agreement negotiations are only one of several factors which could be responsible for project delays or why some projects may not be economically viable. It is disingenuous to lay the large proportion of blame which is currently asserted at the feet of unions for any delays in concluding a greenfields agreement or for additional costs associated with them. This is particularly so when the evidence, particularly in relation to the time taken to negotiate a greenfields agreement, relied upon in the EM is speculative and anecdotal.⁴⁶

2.54 The ACTU argued 'the speculative claims made by employers and employer associations about the burden of negotiating greenfields agreements do not justify the provisions which appear in the Bill.'⁴⁷

44 Maritime Union of Australia, *Submission 16*, p. 4.

45 ACTU, *Submission 20*, p. 23.

46 ACTU, *Submission 20*, p. 23.

47 ACTU, *Submission 20*, p. 23.

2.55 Mr Tim Lyons, Assistant Secretary of the ACTU, stated the Bill returned some arrangements in place under Work Choices, where employers could determine their own workplace agreements:

In relation to greenfield agreements, we say this is a return, essentially, to a position that obtained under Work Choices, where certain categories of employers, principally in the resource sector and construction, are able to dictate the terms of their own workplace agreement, have it agreed by nobody and take it to the commission and have it approved. Nowhere in the world has a feature of you being able to make an agreement with yourself, and this is restoring a species of this. We note that it also creates a perverse incentive for the employers in that sector not to reach agreement: if they run the clock down for three months, they can take their own draft to the commission. We note and complain, with some bitterness, that the coalition is proposing to enable arbitral settlements of agreements for a thin group of major employers, something which is not available to workers or businesses generally. In fact, nobody really has access to arbitration of these matters in the rest of the economy, unless you are damaging the national economy or causing danger to the health, safety or welfare of the population. And yet there is a carve-out here to give arbitral function to the commission in respect of, essentially, mining and construction companies.⁴⁸

Department's response

2.56 The Department contended the changes in Part 5 of the Bill related to concerns expressed by the Fair Work Review Panel about the potential adverse effects on investment if enterprise agreements are not implemented and negotiated in a timely manner. Specifically, the Department suggested Greenfields agreements are a unique and appropriate policy response:

In greenfields agreements the *Fair Work Act* review of the previous government found that the existing provisions give unions a significant capacity to frustrate or delay the making of a greenfields agreement and this has the potential to threaten future investment in major projects. To ensure greenfields agreements can be made in a timely manner, the bill will extend good-faith bargaining to greenfields agreements and provide that an employer may issue a written notice to the relevant union or unions which commences a three-month negotiation period. If agreement is not reached in that period, the employer make take the agreement to the Fair Work Commission for approval and, if they do so, the agreement must satisfy existing approval requirements, plus an additional test that the agreement provides, on an overall basis, pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.⁴⁹

48 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 2.

49 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 11.

2.57 The Regulation Impact Statement includes data demonstrating the economic benefits of the proposed changes would be up to \$64 million per annum for the next ten years.⁵⁰ The Department contended that suggestions the three month timeframe could be used to run down the clock by employers were inaccurate, given the inclusion of requirements for 'good-faith bargaining' to take place:

The other thing to note is that currently we do not have good-faith bargaining applying at all. I would say that even though there is a tension, which Mr Lyons identified, with having bargaining orders run out basically at the end of the notice period, it is better than what we have now, absent any good faith bargaining at all. Something has to give; otherwise you could have these things dragging on and on, and the very mischief that these amendments intended to address would re-emerge.⁵¹

2.58 The Department argued the new process, outlined in Figure 1, would result in few practical changes to the enterprise bargaining process, and that employers would continue to bargain with relevant employee organisations. Further, the biggest change was the inclusion of good faith bargaining rules, that require:

The bill extends good-faith bargaining rules to single enterprise agreement negotiations for the first time. This has the automatic effect of extending the good-faith bargaining. It also means that parties can go and get assistance from the commission, as well as go to the good-faith bargaining rules.⁵²

2.59 The Department also noted the option to issue a written notice to commence the three month negotiation period, criticised by the ACTU as 'running down the clock', was optional, and not required for every Greenfield agreement. However, if a written notice period has commenced and parties have not reached an agreement, they can continue to bargain, or seek the Fair Work Commission approval, with some conditions:

The application for approval can only be made if the union that the employer is bargaining with has been given a reasonable opportunity to sign the agreement first. If the employer never issues a notice to commence the three-month bargaining process, negotiations must continue in good faith until the parties reach agreement or everyone agrees that they have to cease negotiations.

If an agreement is submitted to the Fair Work Commission for approval, whether under the new three-month process or not, all of the existing approval criteria in the act—the 'better off overall' test and the public interest test, for example—continue to apply. For agreements made under the new three-month process, there is an additional approval requirement,

50 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 11.

51 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 14 May 2014, pp 16-17.

52 Ms Janey Kuzma, Senior Executive Lawyer, Department of Employment, *Proof Committee Hansard*, 14 May 2014, pp 16-17.

and that is that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions in the relevant industry for relevant work. That only applies under the new system, not for the individual agreements.⁵³

Committee view

2.60 The Committee agrees the provisions in Part 5 adequately address the issues raised by the Fair Work Review Panel, and that they would do much to ensure Australia's economic prosperity, by providing certainty for investors considering Australian resources and construction projects.

2.61 The Committee is not persuaded that the amendments contained in Part 5 would allow the unilateral making of enterprise agreements. The Committee is satisfied with the protections in the Bill, and notes the provisions enforcing the three month negotiation period will create incentives for both employers and employees to bargain in good faith, notwithstanding the new legislative requirement for them to do so.

2.62 The Committee agrees that on balance the provisions, together with the continued role of the Fair Work Commission as an independent umpire, would continue to ensure that employers and employees undertake good faith bargaining when making new enterprise agreements.

Part 6: Transfer of business

2.63 Under current legislation where there is a transfer of business, the old employer's enterprise agreement (or other relevant instrument) will continue to cover the employee and the new employer. The Fair Work Review Panel recommended the FWA be amended to make clear that when employees seek transfers on their own initiative, they will be subject to the terms and conditions of the new employer. As recommendation 38, it would be enacted by Items 54 and 55 in the Bill.⁵⁴

2.64 The explanatory memorandum states that when determining whether an employee sought to become employed on their own initiative before the termination of their employment with their previous employer, it would be necessary to consider the circumstances giving rise to the new employment:

For example, an employee may be considered to have sought employment on his or her own initiative where an employer provides information about job opportunities within the corporate group which the employee then chooses to pursue for career progression or lifestyle reasons.⁵⁵

53 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 14 May 2014, pp 16-17.

54 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 28.

55 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 28.

2.65 The ACTU argued the changes in Part 6 were included for the benefit specifically of Qantas, to allow them as an employer to compel employees to accept transfers, even when it is to their own detriment:

The ACTU does not support this proposal. We submit that this proposal is open to exploitation. An employer may restructure their operations with the sole purpose of avoiding their obligations under industrial instruments, and few employees would choose “no job” when their only other alternative was to keep their job on reduced conditions.⁵⁶

2.66 The Department rebutted this claim, noting that the transfer was voluntary and that there were significant savings for employers when an employee elected to transfer on their own initiative:

As a general rule, where an employee transfers between employers that are associated entities, this will result in a transfer of business and the employee’s industrial instrument will transfer with them to the new employer with the employee. This situation applies even where the transfer was initiated by the employee themselves. Under the current transfer of business rules in the Fair Work Act, the only way to stop an instrument transferring with an employee (including in these circumstances) is to seek an order to that effect from the Fair Work Commission. The Fair Work Act Review 2012 considered that removing the need for this process in relation to voluntary transfers between associated entities would reduce unnecessary expense to employers and employees and increase mobility opportunities for employees.⁵⁷

2.67 The Department noted significant savings would be made by removing the requirement of applications to the Fair Work Commission, noting the Regulation Impact Statements' calculation of savings for employers of up to \$95, 112 per annum.⁵⁸

Committee view

2.68 The Committee is not persuaded by evidence from submitters that the amendments in Part 6 are targeted to assist one particular company, but instead provide numerous options to many businesses and employees in Australia.

2.69 The Committee accepts the evidence that where an employee applies to transfer between two associated business entities, they should be covered by the conditions in the new employer's enterprise agreement. The Committee does not agree that conditions imposed by the previous employer's agreement should apply to the employee when they have voluntarily transferred.

56 Australian Council of Trade Unions, Submission 20, p. 27.

57 Department of Employment, *Submission 14*, pp 23-24.

58 Department of Employment, *Submission 14*, pp 23-24.

Part 7: Protected action ballot orders

2.70 Recommendation 31 of the Fair Work Review Panel recommended the FWA be amended so that applications for protected action may only be made when bargaining for a proposed agreement has commenced voluntarily or because of majority support determination has been obtained. The explanatory memorandum notes that this recommendation concerns the 'strike first, talk later' issue raised in *JJ Richards Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.⁵⁹

2.71 The Fair Work Review Panel also recommended the FWA be amended to expressly provide that where bargaining has commenced for the purpose above and any disagreement over the scope of the agreement, the Bill includes a legislative note to make clear that, 'disagreement over the scope of a proposed enterprise agreement does not, of itself, prevent the taking of protected industrial action.'⁶⁰

2.72 Some submitters were critical of the amendments contained in Part 7, arguing they represented an infringement on the abilities of workers to strike – a right that has existed in Australian industrial law since the early 1900s. Other submitters argued the changes in Part 7 related to removing an irregularity in the Fair Work Act (and recommended by the Fair Work Review Panel), that allowed employee organisations to 'strike first, bargain later'.

2.73 The ACTU argued the Bill would dramatically affect the ability of employees to strike during the bargaining process:

That is, the position as the law stands today, prior to this bill, reflects a right to take industrial action subject to tests associated with bargaining in good faith and continuing to attempt to bargain in good faith. It provides no right to strike without discussions, unless it is a circumstance, like in the *JJ Richards* case, where the employer refused to have those discussions.⁶¹

2.74 Other submitters, like Ai Group argued that Item 56 (as contained in Part 7) is consistent with Recommendation 31 of the Fair Work Review Panel, and the views expressed by Jessup and Tracey JJ in *JJ Richards*:

While the judges held that the existing industrial action provisions of the FW Act enable industrial action to be taken before bargaining has formally commenced, both judges highlighted the merits of a more logical, ordered and consistent approach...⁶²

It is fair and reasonable to require that a union obtain a majority support determination if an employer does not initiate or agree to bargain. Under

59 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 29.

60 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 29.

61 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 2.

62 Ai Group, *Submission 23*, p. 16.

the FW Act, collective bargaining is compulsory if the majority of employees support collective bargaining but it is not compulsory if the majority of employees do not want a collective agreement. It is not logical or fair for a union to be granted the right to organise industrial action to coerce an employer to bargain if the majority of employees do not support the collective agreement. 39% of Australian employees have their pay set through individual arrangements (ABS, 6306.0), for example through annual performance reviews for each individual employee, and no doubt most of these employees would not want to have their pay set through collective bargaining.⁶³

2.75 The Department noted that employers and employer representatives had expressed concerns about whether industrial action could be used as a tactic to pressure employers to commence bargaining for a proposed agreement, with some stakeholders arguing the interpretation of the requirements and the operation of s 236 of the FWA already provides a mechanism for employees to compel an employer to bargain.⁶⁴

2.76 Further, the Department submitted:

The effect of the amendment is that protected industrial action can only be taken if bargaining for a proposed agreement has commenced, consistent with the recommendation of the Fair Work Act Review 2012. A legislative note makes clear that the absence of agreement about scope of a proposed enterprise agreement does not prevent the taking of protected industrial action.⁶⁵

Committee view

2.77 The Committee is satisfied that the amendments contained in Part 7 are an appropriate legislative response to ensure fairness in the bargaining process, noting that protected industrial action can still take place once bargaining has commenced. The Committee accepts it is completely reasonable and logical to require that bargaining commence before industrial action may take place.

Part 8: Right of Entry

2.78 Part 8 proposes changes to the right of entry framework contained in the FWA. The explanatory memorandum notes:

The object of the Part is 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

63 Ai Group, *Submission 23*, p. 18.

64 Department of Employment, *Submission 14*, p. 23.

65 Department of Employment, *Submission 14*, p. 23.

and the right of occupiers of premises to go about their business without undue inconvenience.⁶⁶

2.79 Part 8 of the Bill addresses numerous issues relating to the operation of the right of entry framework, including repealing amendments made by the *Fair Work Amendment Act 2013* that require an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations. Part 8 would also make changes to the requirements for the default location of interviews and discussions, propose new eligibility criteria that determine when permit holders may enter premises with one or more employees or Textile, Clothing and Footwear award workers, and expand the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.⁶⁷

2.80 Some submitters, including employee organisations, criticised the changes contained in Part 8, arguing they went far beyond the policy taken by the Coalition to the 2013 election. Other submitters argued Part 8 would correct inappropriate changes made to the FWA by the *Fair Work Amendment Act 2013* (Cth), that imposed an unfair burden on employers as they were unable to negotiate the terms of the accommodation and travel expenses they were expected to provide for permit holders.

2.81 The ACTU argued the changes represented an attempt to prevent employees having access to union representatives at work:

The right-of-entry provisions go significantly further than what was indicated in the coalition policy, and will practically prevent people from getting access to their union at work, including by restricting the right of permit holders, who are fit and proper and who have received education, to access lunch rooms to see workers when they are on their breaks. Remember, the only circumstance under which union officials can talk to people is during their own time on a break. It also sets in place, for the first time, an arrangement where workers essentially have to physically invite the union in in order for them to get on site, with all of the difficulties that will pertain, including requiring people to take steps to positively invite the union, possibly in a circumstance of some considerable fear.⁶⁸

2.82 Ai Group strongly supported the amendments in Part 8, while criticising the current arrangements made by the *Fair Work Amendment Act 2013*:

These Items reverse the inappropriate right of entry changes introduced through the Fair Work Amendment Bill 2013 regarding accommodation arrangements and transport arrangements. 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

66 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 29.

67 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 30.

68 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 2.

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.

2.83 The Department noted Part 8 contains many policy commitments made by the Coalition prior to the 2013 election, including:

- providing new criteria for when a permit holder may enter a workplace for discussion purposes;
- expanding the Fair Work Commission's capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- reinstating the rules on location of interviews and discussions in place before the amendments made by the Fair Work Amendment Act 2013; and
- repealing amendments made by the *Fair Work Amendment Act 2013* requiring employers to provide transport and accommodation to permit holders seeking to access remote work sites.⁶⁹

2.84 The Department stated the amendments would restore balance to the rights of unions to have discussions with employees and the rights of employers to conduct business without unnecessary inconvenience:

While employees' rights to industrial representation will be maintained, the changes are expected to reduce the burden facing employers under the current right of entry arrangements.⁷⁰

Committee view

2.85 The Committee agrees that arrangements should be returned to those in place prior to the passage of the *Fair Work Amendment Act 2013* that imposed a significant financial burden on employers. The Committee is satisfied the amendments in Part 8 would restore balance to both the ability of employees to participate in and be represented by trade unions, but also the ability of employers to conduct their businesses without unnecessary or inappropriate burdens. The Committee agrees it is not appropriate that permit holders are not given an incentive to negotiate transportation and accommodation requirements, where appropriate.

69 Department of Employment, *Submission 14*, p. 6.

70 Department of Employment, *Submission 14*, p. 6.

Part 9: FWC hearings and conferences

2.86 Part 9 would amend the FWA to provide that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application made under sections 399A or 587. This would implement recommendation 43 of the Fair Work Review Panel's report.⁷¹

2.87 The ACTU criticised the inclusion Part 9, arguing it would advantage employers over employees in hearings before the Fair Work Commission. They submitted the summary dismissal powers would benefit employers, and that Part 9 would allow hearings and inquiries being determined on the papers. Further, they argued that Tribunals of the Fair Work Commission generally try to ensure equity by assisting unrepresented parties in the process:

If an unrepresented applicant is unable to properly articulate in a written submission why the matter should not be dismissed, they will be disadvantaged by these provisions.⁷²

2.88 The Department submitted that the Fair Work Commission already has the power to dismiss unfair dismissal applications 'on the papers' in some circumstances without a hearing, including when an application is vexatious or unmeritorious. Further, the Fair Work Commission may dismiss a matter where the applicant fails to attend or comply with Fair Work Commission orders. The Department noted however, that the Commission's powers to dismiss are extremely limited and in cases of disputed facts, the limitations serve to increase the reluctance of the Fair Work Commission to dismiss matters.⁷³

2.89 The Department also submitted the Bill includes numerous procedural safeguards that provide transparency and ensure both parties are afforded procedural fairness:

In particular, the Bill includes the requirement that the Fair Work Commission must invite parties to provide further information and take this into account before making a decision to dismiss an application without a hearing or conference. Having considered this additional information, the Commission may decide to conduct a conference or hearing if it considers it necessary.⁷⁴

Committee view

2.90 The Committee is satisfied that, on balance, the amendments would expedite proceedings in the Fair Work Commission and assist the Commission in ensuring it

71 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 36.

72 Australian Council of Trade Union, *Submission 20*, p. 37.

73 Department of Employment, *Submission 14*, pp 24-25.

74 Department of Employment, *Submission 14*, p. 25.

only conducts hearings when appropriate to do so. The Committee agrees with the evidence provided by the Department that applicants will retain the procedural fairness and protections afforded to them currently.

Part 10: Unclaimed money

2.91 Part 10 would amend the FWA to provide that the FWC may pay an amount to former employees under section 559. Further, the amendment sets out the conditions under which interest would be payable on money held in the Consolidated Revenue Fund for six months or more.

2.92 Part 10 would also confer on the Minister the power to make an instrument determining the method for calculating interest payable to former employees in these circumstances.⁷⁵

2.93 The ACTU argued that Part 10 does not implement the Coalition's 2013 election policy, suggesting the policy was supposed to require interest is payable on monies held by the FWC on behalf of employees. The ACTU suggested Part 10 does not mandate the payment of interest, as promised in the policy.

2.94 The Department's submission noted that if enacted, Part 10 would provide for interest to be payable on amounts of \$100 or more, and would only apply to money received by the Commonwealth from employers after the commencement of the provisions contained in part 10. The Department submitted:

The Government is concerned that some employees are not receiving the full value of the money that has been held for them by the Commonwealth.⁷⁶

Committee view

2.95 The Committee agrees it is appropriate that interest is paid on amounts over \$100 and shares the Government's concerns that employees should receive the full value of money held on their behalf by the Commonwealth.

Recommendation 1

2.96 The Committee recommends that the Senate pass the Bill.

Senator Chris Back
Chair, Legislation

75 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. 36.

76 Department of Employment, *Submission 14*, p. 20.