

The Senate

Education and Employment
Legislation Committee

Fair Work Amendment Bill 2014 [Provisions]

June 2014

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RECOMMENDATIONS

Recommendation 1

2.96 The Committee recommends that the Senate pass the Bill.

CHAPTER 1

Fair Work Amendment Bill 2014

Reference

1.1 On 6 March 2014, the Senate referred the provisions of the Fair Work Amendment Bill 2014 to the Education and Employment Legislation Committee for inquiry and report by 5 June 2014.¹

Conduct of inquiry

1.2 Details of the inquiry were made available on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 23 individuals and organisations, as detailed in Appendix 1. A public hearing was held in Canberra on 14 May 2014. The witness list for that hearing is available in Appendix 2.

Background

1.3 The Bill would amend the *Fair Work Act 2009* (Cth) (FWA) to implement numerous policy commitments made by the Government before the 2013 federal election. These commitments were outlined in the *Policy to Improve the Fair Work Laws* released by the then shadow Minister (and current Minister) for Employment, Senator the Honourable Eric Abetz.² The Bill also responds to numerous outstanding recommendations from the review into the Fair Work Act (FWA) (Fair Work Review Panel): *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2013).³

Fair Work Review Panel Recommendations

1.4 The Bill proposes to implement numerous recommendations of the Fair Work Review Panel, including:

- Recommendation 3 (extensions of unpaid parental leave);⁴
- Recommendation 6 (annual leave paid on termination in accordance to relevant industrial instrument);⁵
- Recommendation 2 (employees cannot take or accrue leave under the FWA);⁶
- Recommendation 9 (requires flexibility terms in modern awards and enterprise agreements);⁷

1 *Journals of the Senate*, 6 March 2014, pp 575 to 577.

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

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

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

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

6 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. i.

- Recommendation 11 (requires flexibility terms in enterprise agreements provide, as a minimum, that such agreements may deal with when work is performed, overtime, penalty rates, allowances and leave loading);⁸
- Recommendation 12 (confirms that benefits other than entitlement to payment of money may be taken into account in determining whether the employee is better off overall under the individual flexibility arrangement);⁹
- Recommendation 24 (provides a defence to an alleged contravention of a flexibility term);¹⁰
- Recommendation 31 (provides that an application for a protected action ballot order cannot be made unless bargaining has commenced);¹¹
- Recommendation 38 (provides that there will not be a transfer of business under Part 2-8 of the FWA when an employee becomes employed with an associated entity of his or her former employer after seeking that employment on his or her own initiative before the termination of the employee's employment with the old employer);¹² and
- Recommendation 43 (provides that subject to certain conditions, the Fair Work Commission (FWC) is not required to hold hearings or conduct conferences when determining whether to dismiss an unfair dismissal claim).¹³

Government policy before the 2013 election

1.5 The remaining elements of the Bill seek to implement commitments made by the Government prior to the election, including providing for new single-enterprise greenfields agreements and amending the right of framework conditions in the FWA. These include repealing numerous amendments made by the *Fair Work Amendment Act 2013* (Cth) that required employers or occupiers to:

- provide transport and accommodation arrangements for permit holders;
- provide new eligibility criteria to determine whether permit holders may enter premises for the purposes of holding discussions or conducting interviews;
- change legislative requirements for default locations for interviews; and

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

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

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

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

11 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. ii.

12 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. ii.

13 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. ii.

- expand the FWC's capacity to deal with disputes about the frequency of visits to premises for discussions.¹⁴

Overview of the Bill

1.6 The Bill was introduced in the House of Representatives on 27 February 2014.¹⁵ The Bill is comprised of two schedules. Schedule 1 proposes to amend the FWA as follows:

Schedule 1, Part 1	Extensions of periods of unpaid parental leave
Schedule 1, Part 2	Payment for annual leave
Schedule 1, Part 3	Taking or accruing annual leave while receiving workers' compensation
Schedule 1, Part 4	Individual flexibility arrangements
Schedule 1, Part 5	Greenfields agreements
Schedule 1, Part 6	Transfer of business
Schedule 1, Part 7	Protection action ballot orders
Schedule 1, Part 8	Right of entry
Schedule 1, Part 9	FWC hearings and conferences
Schedule 1, Part 10	Unclaimed money ¹⁶

1.7 Schedule 2 contains numerous transitional amendments to the FWA.

Human Rights implications

1.8 The explanatory memorandum details the bills engagement of numerous human rights instruments:

- the right to work under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right to just and favourable conditions of work under Article 7 of the ICESCR;
- the right to maternity leave under Article 10(2) of the ICESCR and Article 11(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);

14 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, p. i.

15 *Votes and Proceedings*, 27 February 2014, pp 329 to 330.

16 Fair Work Amendment Bill 2014, p. i.

- the rights of parents and children under Articles 3, 5 and 18 of the Convention of the Rights of the Child (CRC) and Article 5(b) of the CEDAW;
- the right to an effective remedy under Article 2 of the International Covenant on Civil and Political Rights (ICCPR);
- the right to a fair hearing under Article 14 of the ICCPR;
- the right to protection against arbitrary and unlawful interferences with privacy under Article 17 of the ICCPR; and
- the right to freedom of association in Article 22 of the ICCPR.¹⁷

1.9 The explanatory memorandum states that the Bill is compatible with human rights and freedoms listed under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), arguing that the amendments are compatible as they advance the protection of human rights. Further it argues:

To the extent that the amendments may limit human rights, those limitations are reasonable, necessary and proportionate.¹⁸

Financial Impact Statement

1.10 The Committee notes the inclusion in the Regulation Impact Statement of data suggesting the red tape and compliance savings for the amendments are expected 'to be in order of \$70,052,747 per year over ten years to the Australian economy.'¹⁹

Acknowledgement

1.11 The Committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

Notes on References

1.12 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the proof and the official transcripts.

17 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, at Statement of Compatibility, p. li.

18 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, at Statement of Compatibility, p. lxiii.

19 Fair Work Amendment Bill 2014, *Explanatory Memorandum*, at Regulation Impact Statement, p. xlviii.

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:

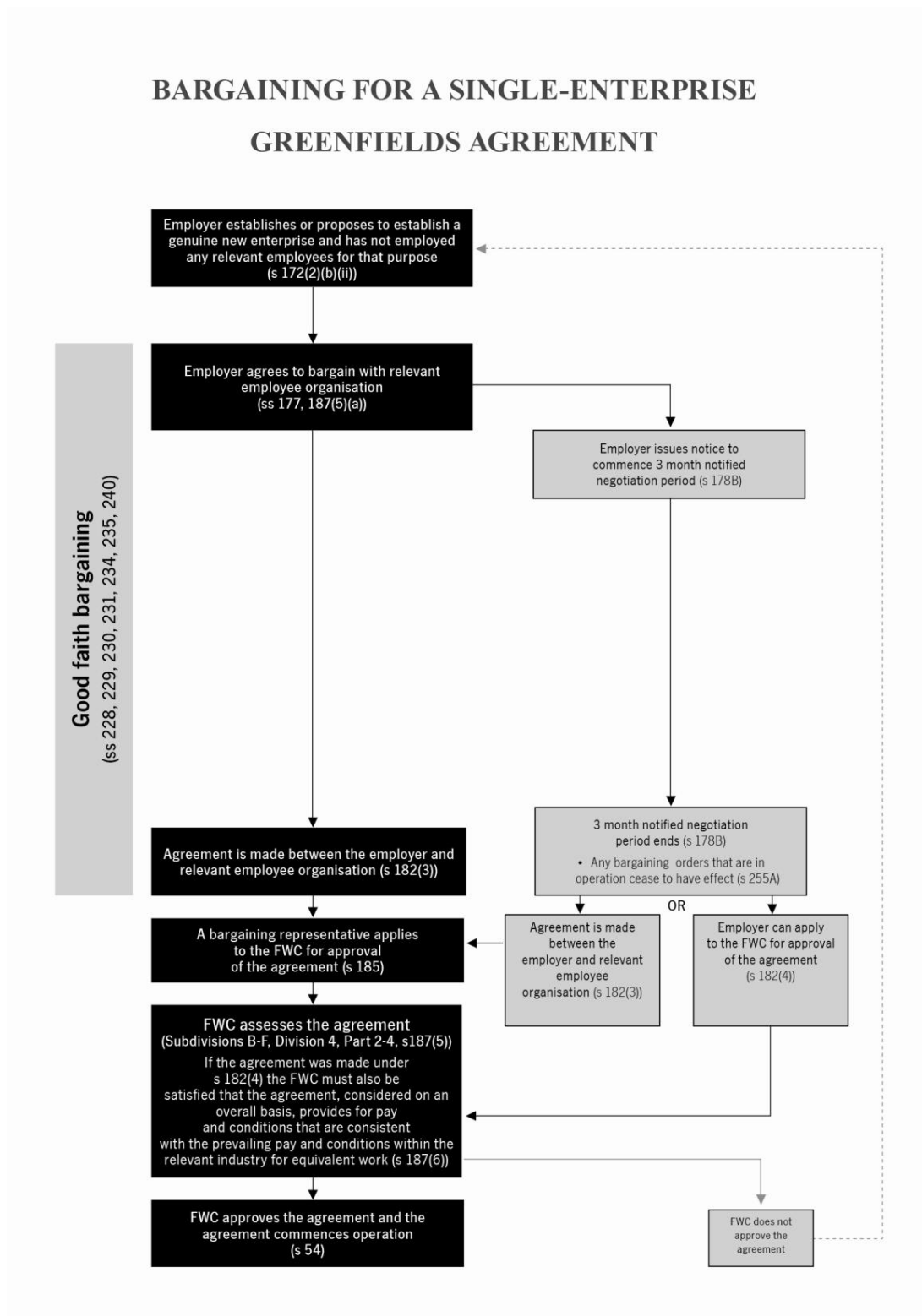


Figure 1 - Explanatory Memorandum, p. 15.

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.

LABOR SENATORS' DISSENTING REPORT

Introduction

- 1.1 Labor Senators oppose the Fair Work Amendment Bill 2014 (the Bill).
- 1.2 Labor Senators note that the Bill contains a range of amendments to the Fair Work Act 2009 (the Act) that will have a detrimental impact on Australian workers and their families.

Individual flexibility arrangements (IFAs)

- 1.3 The Bill removes a key safeguard when it comes to what can be traded away under an IFA. The relevant Expert Panel recommendation states that if a non-monetary benefit is being traded for a monetary benefit, the value of the monetary foregone must be relatively insignificant, and the value of the non-monetary benefit is proportionate. Despite this clear prescription, 'relative insignificance' and 'proportion' are missing from the amended Bill.
- 1.4 The current law in the area is very clear and was most recently re-stated by a Full Bench of the Commission. The Commission stated that if you don't pay the additional rate at the time the award says it should be paid to you (monetary element), that arrangement does not leave you better off overall, even though it might suit your personal circumstances to work at that time (non-monetary element).
- 1.5 There exists no assurance that the employee is provided with information about what they are trading off, and the value of what they are losing – especially if the “flexibility” is proposed by the employer and not requested by the employee. Evidence was given in the hearing to this point:

CHAIR: But it also does grant great flexibility. Even in the example you gave, there may well be a circumstance in which the person you mentioned finds that to be of greater convenience to them; might it not?

Mr Lyons: There are two points about that. Firstly, this bill does not even require the penalty rate that person would be giving up to be ever quantified to the person—and I do not think it is contested, by the way, that it does not have to be quantified in dollar terms, because I have specifically requested of the minister that a requirement associated with a dollar be inserted in the bill and he has declined to do it. The document itself only needs to say: 'This IFA varies clause 39 of the award that deals with Sunday work.' That is what it needs to say. It does not need to say how it does it or quantify that in any way. So a worker can end up signing this without any real understanding—and remembering they have no comeback about this and

no-one else ever looks at it—of what they are actually giving up. That is our complaint.¹

1.6 In evidence given at the hearing into the Bill, the Department of Employment made reference to "retaining all existing protections for employees" and not changing the existing law regarding non-monetary benefits.² Labor Senators oppose this evidence.

1.7 The Bill fails to address defective IFAs, which are addressed under the existing law. An IFA may be defective for one of the following reasons:

- It wasn't genuinely agreed to;
- The employer hasn't ensured that it leaves the worker better off overall
- The employer hasn't ensured that the IFA is reduced to writing and signed by the worker
- The employer hasn't ensured that they gave a copy of the IFA to the employee.

1.8 Where an IFA is defective, the law deems this to be a breach not of the IFA, but of the term of the award or the agreement that permitted to be made in first place (see sections 145(3) [awards] and 204(3) [collective agreements]), which affords an employee the opportunity to take action in court for penalties and compensation (section 545).

1.9 Compensation in such a case would be judged on how much has the worker lost as a result of them being made worse off as compared to the award/agreement under which the IFA was made. The overlay of the genuine needs statement and the defence significantly weakens this. The 'genuine needs statement' process only acts to protect the employer against action from the employee, rather than the employee's rights, despite the Department stressing that this would add additional protection for employees³. Labor Senators cannot envisage situations where the employee would be afforded any additional protections, rather the opposite. The "genuine needs statement" serves only to bolster an employer's defence to a prosecution:

Because each IFA will now include a testimonial from the worker about how it meets their needs and leaves them better off overall, employers are likely to rely on that testimonial to demonstrate their "reasonable belief" for the purposes of the defence. A successful defence will result in no exposure to a penalty, and no requirement to remedy any underpayment.⁴

1 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p.7.

2 Ms Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p.12.

3 Ms Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p.12.

4 Australian Council of Trade Unions (ACTU), Submission 20, p. 21.

1.10 Additionally, the “genuine needs statement” fails to provide any protection for employees following execution of the statement, regardless of information learnt post-execution, and without any lodgement or oversight, fails to provide protection for workers’ minimum conditions:

Senator LINES: Are you saying that if I am the worker and I sign an individual flexibility agreement that takes my penalty rate away on a Sunday, and I sign a statement that says that I am better off and then I am found not to be better off, there is no comeback on the employer, there is no compensation? Is that what you said?

Mr Clarke: Correct. That is the way that this bill operates and indeed it is not just us saying that. VECCI, I think it was, in their submission applauded the bill for that impact of insulating employers from prosecutions.⁵

Labor Senators’ view

1.11 The Labor Senators of the committee are not persuaded by evidence from the Department of Employment that all existing protections for employees are retained under the amendment.

1.12 The Labor Senators of the committee are not persuaded by evidence from submitters that the “genuine needs statement” outlined in the amendment provides any protection for employees, and trades off employees rights in the workplace under the guise of flexibility.

1.13 The Labor Senators of the committee accept the evidence that no assurance has been given by the Department that the employee is provided with information about what they are trading off. Labor Senators assert this targets low-paid workers, workers with limited access to formal education, and other vulnerable groups of workers who are left unrepresented at the mercy of informed employers.

Greenfields Agreements

1.14 The proposed changes to the Greenfields agreement making process contained in the Bill are heavily skewed in favour of employers.

1.15 In essence, the Bill will extend good faith bargaining rules to the negotiation of greenfields agreements. For example, employers and unions would be required to participate in meetings with each other. Labor Senators are not oppose to this, except in that evidence given by The Department of Employment stated that unions are too easily able to frustrate the making of greenfields agreements. Labor Senators assert that the changes to the way Greenfields agreements are made essentially pave the way for employers to make agreements with themselves, and seek only to remove unions from the bargaining table.

5 Mr Clarke, Director, Industrial and Research, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 4.

1.16 The 2012 Review recommended that the Fair Work Act be amended to require employers intending to negotiate a Greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.⁶ This Bill fails to address this recommendation. The Bill establishes a new optional three month negotiation timeframe, which was not a recommendation from the review, wherein if agreement can't be reached within the time, the employer and the employer only will be able to take its proposed agreement to the Fair Work Commission for approval. These proposed changes create a situation where employers can simply 'run down the clock' on bargaining with employees, meaning the employer could essentially walk away from the negotiating table and await the expiry of the period. Evidence given by the ACTU at the hearing outlined issues with the three-month negotiation timeframe, and the skewing of the benefits afforded by the amendment to the employer:

Mr Lyons: ...The other thing, frankly, is these are very sophisticated employers that will use these provisions; they are the big end of town represented by sophisticated law firms and IR practitioners. Anybody that cannot pretend they are bargaining in good faith for three months is not trying. So there will not be any of those orders. Even if there were, they go away at the end of the three-month clock.⁷

1.17 Evidence submitted by the Ai Group confirms that some employers would utilise this amendment to the extent of the above, and that they expect unions would utilise it in the same way, to the detriment of workers.⁸

Labor Senators' view

1.18 The Labor Senators of the committee are not persuaded by evidence from submitters that the amendment to Greenfields agreements will benefit workers and improve timeliness.

1.19 The Labor Senators of the committee note that this amendment may be more acceptable should Recommendation 30 of the Expert Panel replace the current proposed amendments to the bill. Recommendation 30 provides that:

...when negotiations for a [...] greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party conduct a limited form of arbitration including 'last offer' arbitration to determine the content of the agreement.⁹

6 Report of the Fair Work Act Review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, 2012, p. 172.

7 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 9.

8 Australian Industry Group (Ai Group), *Submission 23*, p.10.

9 Report of the Fair Work Act Review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, 2012, pp 180-190.

The bill undermines the right to organise and be represented by a union

1.20 Labor Senators believe that all Australian workers have a right to union representation and unions should have fair access to work sites. Contrary to the very clear commitment given in the Coalition policy, there is no explicit right (conditional or otherwise) given where the union is a bargaining representative within the Bill. The Expert Panel's recommendation provided that there must be a balance between the rights of unions to represent their members and the rights of employers to conduct their business.¹⁰ The Bill's proposed changes to right of entry are heavily weighted in favour of employers and therefore unacceptable.

1.21 Labor Senators believe in freedom of association. If a worker does choose to be a part of a union, it's important that the unions are able to represent them. The amendments have the effect of making it harder for employees to access their union in the workplace, and therefore undermine freedom of association.

1.22 Labor Senators have serious concerns about the 'invitation certificate' process the Government is proposing. This will enable the union to obtain a certificate from the Commission to the effect that the *Commission is satisfied* that there is a member or prospective member that the union is entitled to represent who has invited the union to send a representative on site for the purposes of holding discussions. Such certificates, however, will have expiry dates which will be constrained by as yet unpublished regulations. No provision actually requires that an employer or occupier take notice of an Invitation Certificate.

1.23 There has been some attempt to ameliorate the very obvious difficulty of proving a member or prospective member has invited the union on site, and to ensure the anonymity of that worker. Labor Senators support the submission of the Community and Public Sector Union (CPSU) on the matter, who state that:

Some employers will use these amendments to unreasonably delay entry by a union. The requirement that a union be invited in by a member or potential member also creates the capacity for implicit and/or explicit intimidation of the workforce.¹¹

1.24 The assertion by the Department of Employment that the Fair Work Review Panel had found increased entries "had time and cost impacts for employers and for the productivity of the economy"¹² is simply untrue. The Fair Work Review Panel's discussion regarding right of entry makes absolutely no finding regarding productivity impacts. In fact, the report noted that:

An increased capacity for entry rights to be exercised was a deliberate policy change in the FW Act compared to WorkChoices and was true to the FW Act's objectives

10 Fair Work Amendment Bill 2013, Part 3-4, p. 6.

11 Community and Public Sector Union (CPSU), *Submission 2*, p. 3.

12 Ms Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 11.

...

The FW Act was designed to overcome this very issue, and we therefore consider that it would be inconsistent with the objects of the FW Act to amend it.¹³

Labor Senators' view

1.25 The Labor Senators of the committee have demonstrated as above that the evidence given by the Department regarding the impact on time and costs should be discounted.

1.26 The Labor Senators of the committee accepts the evidence that the Bill undermines the right to organise and for workers to be represented by a union.

The Bill fails to allow proper scrutiny of process in changes to Paid Parental Leave

1.27 Labor Senators note that the provisions of the Act as they currently stand appropriately govern unpaid parental leave, and provide a right for an employee to request an extension of the period of parental leave they are otherwise entitled to, by up to twelve months.

1.28 The Bill would change the present position by prohibiting the employer from refusing an employee's request unless the employer has first given the employee a reasonable opportunity to discuss the request. While Labor Senators support the idea of employers being compelled to discuss requests made with employees, the right to request must be underscored by an effective right of review that ensures that requests for flexible working arrangements are given proper consideration and that a refusal is indeed due to reasonable business grounds.

1.29 Evidence presented by the Australian Council of Trade Unions (ACTU) cites research conducted by the General Manager of Fair Work Australia indicating that the majority (93.3%) of requests for extensions of unpaid parental leave are being granted, yet there a small proportion of eligible employees may not make a request because due to concerns about the negative effects on their employment or their relationship with their employer (11.1%) or had a verbal request refused by their employer (2.2%).¹⁴

13 Report of the Fair Work Act Review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, 2012, p. 173.

14 *General Manager's Report into the operation of the provisions of the NES relating to requests for flexible working arrangements and extensions of unpaid parental leave: 2009-2012*, November 2012, p. 66, As cited in Australian Council of Trade Unions (ACTU), *Submission 20*, p. 3.

Labor Senators' view

1.30 Labor Senators reject this amendment due to the failure of the Bill to provide appropriate scrutiny of the process.

Payment for Annual Leave

1.31 Labor Senators stress that the wording as per the Bill are open to interpretative arguments. Employees should not be financially disadvantaged because they have not taken their full entitlement to paid annual leave at the time their employment ends.

Labor Senators' view

1.32 Labor Senators agree that if the current requirement to pay at the full rate of pay were included in the Bill's proposed s 90(2) and the words relating to payment being calculated at the full rate of pay immediately before the date of termination, the provision would be acceptable.

The bill allows agreements to be made in secret with no access to an independent arbiter or independent scrutiny

1.33 Amendments as recommended would allow IFAs to be made in secret, with no requirement for lodgement of agreements, or scrutiny of the content or process. The ACTU expressed their concerns regarding this matter during hearings:

Mr Lyons: AWAs were never publicly published, but they were required to be lodged with a government agency, which had various levels of tests associated with those, and there was analysis and benchmarking done associated with that. The mere fact of an employer having to send it to the Commonwealth has a certain deterrent effect from the worst types of abuse, but these are things that will live in a filing cabinet. You have workers signing up to them who have never been told what it is they are signing away. They are effectively signing away their own rights to make a claim that they were ripped off, and there will be no way of ever finding out about it.¹⁵

1.34 Recommendation 10 of the Fair Work Review Panel would enable the Fair Work Ombudsman to investigate as to whether IFAs were being abused by a particular employer or employers in a particular industry.

Mr Lyons: ... The point that Mr Clarke made in answer to a question from Senator Lines was that the recommendation the coalition says it is

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

implementing here from the Fair Work Act review panel said that an employer using one of these devices should notify the Fair Work Ombudsman that they have done it, so at least the Fair Work Ombudsman knows. If it is saw 5,000 of them in little shops in North Queensland or something you might think, 'Well, maybe there is something going on here. We can go and have a bit of a look and use our powers.' But it is secret in the sense that these things are done and they allow people to be excised from key aspects of the safety net set by modern awards.¹⁶

Labor Senators' view

1.35 The Labor Senators of the committee support the deterrent effect of lodging IFA's, regardless of whether the IFA's are published publicly, and notes the Government's failure to incorporate the Expert Panel's recommendation 10 into the amendments.

1.36 The Labor Senators of the committee accepts the evidence that independent scrutiny of IFA's are essential in keeping employers accountable, and protecting worker's rights in the workplace.

Conclusion

1.37 Labor Senators report that the Bill represents a race to the bottom on labour standards and is not meritorious for workers. This is a return to WorkChoices by stealth.

1.38 These amendments are unnecessary and complicated, and put Australian jobs at risk.

1.39 The bill unfairly targets low-paid workers, workers with limited access to formal education, and other vulnerable groups of workers who are left unrepresented at the mercy of informed employers.

Recommendation 1

1.40 Labor Senators recommend that the Senate reject the Bill.

Senator Sue Lines
Deputy Chair, Legislation

Senator Mehmet Tillem

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

AUSTRALIAN GREENS' DISSENTING REPORT

1.1 The Australian Greens oppose the Fair Work Amendment Bill 2014 (the Bill).

1.2 The full scale of the Abbott Government's attacks on workers, especially young workers, becomes clearer each day.

1.3 This Bill, when read in the context of the 2014 Budget and related legislation, makes it clear that life in Australia is going to be very different, in coming years, to how it has been in the past.

1.4 A young person who finishes school and continues to tertiary education like university or TAFE will have to spend the next six months looking for work with no income at all – not even the dole, which is below the poverty line.

1.5 If they are not able to find work, they will be put on a Work for the Dole program. At the end of that time, if they are still out of work they will be denied the dole for six months, rather than receiving support. This will happen regardless of other factors, like living in a regional town with high youth unemployment, or being located in a suburb where job prospects are low.

1.6 The government has no solution for what a young person should do when not in receipt of benefits. Landlords and utility companies will still need to be paid. Loss of housing is a real prospect in this situation.

Individual flexibility arrangements (IFAs)

1.7 The evidence before the Committee in this Inquiry makes it clear that a young person faces a grim future on the job front, as well. The proposed changes to individual flexibility arrangements (IFAs) are particularly disturbing. In short, an unscrupulous employer may now be able to say to a newly employed worker: 'I know there is something called the minimum wage, but I am not interested in paying you that. I am prepared to offer you less, with a few benefits on the side. That might be different from the legislated minimum wage, but really it's up to you – take it or leave it.'

1.8 These statutory creatures – the IFAs – were given life by the former Labor government. They allow an employer and employee to depart from legally defined minimum conditions, provided that an employee is purportedly not overall worse off. However, these agreements don't have to be pre-approved by the industrial umpire: compliance is only ever determined if an employee has the resources to sue their employer.

1.9 Under this Bill, an employer will be able to enter a legally binding agreement with their workforce on Monday, and then contract out of it with an individual on Tuesday.

1.10 Item 8 of this Bill introduces a new Note, which reads in part: Benefits other than an entitlement to a payment of money may be taken into account.

1.11 The government wants to change the test through Item 8 so that ‘non-monetary’ benefits can be taken into account when an employer determines if their employee is better off overall. Does a burger and chips from the owner of the corner shop allow them to deduct \$10 from a young person’s already low wages? If the company owner insists on part-paying a young person in kind with their product, does the person have the power to refuse? Landlords and utility companies only accept money as payment – though this government is unconcerned about that.

1.12 While the assault that the Commission of Audit recommended, in relation to the minimum wage, is on hold, the government has commenced a more underhanded campaign of which this Bill is part. For a generation already facing the triple threats of global warming, unaffordable housing and insecure work, life is about to get a lot more precarious. People will be forced to accept less, because the alternative under the budget welfare reforms is nothing.

1.13 Ultimately, wages and conditions for everyone will be affected. Why employ an older worker when a younger, disempowered one will work under duress for less?

Other elements

1.14 This Bill is objectionable in other respects. Most Australians would assume that an agreement applying in the workforce involves at least two parties. However, under Part 5 of this Bill, an employer is now going to be able to agree with itself about what legislation and minimum conditions will apply in a workplace.

1.15 The provision about so-called Greenfields agreements says that, if an employer is about to start a new project, and wants to negotiate an agreement for wages and conditions over the course of that project when it gets up and running, all the employer has to do is effectively wait three months to get the agreement it wants. They can propose a substandard agreement and, if three months later no bargain has been struck with the union, the employer can seek that the Fair Work Commission ratifies that agreement.

1.16 The Greens also know that in many cases, the only way a worker knows about – let alone is able to enforce – their minimum wage conditions is through a union. However, this Bill proposes, in Part 8, to wind back those provisions which allow for that support to be available.

1.17 The Australian Greens also have concerns about other aspects of this Bill. The Australian Greens do not consider that any element of this Bill has enough merit to warrant support for the Bill.

Recommendation 1**1.18 The Australian Greens recommend that the Senate reject the Bill.****Senator Penny Wright
Australian Greens**

APPENDIX 1

Submissions received

- 1** Australian Manufacturing Workers' Union
- 2** Community and Public Sector Union
- 3** Law Council of Australia
- 4** UnionsWA
- 5** Australian Public Transport Industrial Association/Bus Industry Confederation
- 6** Business Council of Australia
- 7** Chamber of Commerce and Industry WA
- 8** Victorian Employers' Chamber of Commerce and Industry
- 9** Master Builders Australia Ltd
- 10** Housing Industry Association
- 11** Victorian Farmers Federation Industrial Association
- 12** Australian Motor Industry Federation
- 13** National Electrical and Communications Association
- 14** Department of Employment
- 15** Chamber of Commerce and Industry Queensland
- 16** Maritime Union of Australia
- 17** Restaurant and Catering Industry Association
- 18** Business SA
- 19** South Australian Wine Industry Association
- 20** Australian Council of Trade Unions
- 21** Australian Meat Industry Council
- 22** Motor Trade Association
- 23** Australian Industry Group
- 24** Job Watch

- 25 Australian Federation of Employers and Industries
- 26 Australian Mines and Metals Association
- 27 National Fire Industry Association
- 28 Australian Chamber of Commerce and Industry
- 29 Textile, Clothing and Footwear Union of Australia
- 30 Australian Petroleum Production and Exploration Association
- 31 Recruitment and Consulting Services Association Australia and New Zealand
- 32 NSW Government

APPENDIX 2

Witnesses who appeared before the committee

Canberra, Wednesday, 14 May 2014.

BREEN, Mr Adrian, Senior Executive Lawyer, Workplace Relations Legal Group, Department of Employment

CLARKE, Mr Trevor, Director, Industrial and Research, Australian Council of Trade Unions

CULLY, Mr Peter, Branch Manager, Workplace Relations Policy Group, Department of Employment

KUZMA, Ms Janey, Senior Executive Lawyer, Workplace Relations Legal Group, Department of Employment

LYONS, Mr Tim, Assistant Secretary, Australian Council of Trade Unions

MOREHEAD, Dr Alison, Group Manager, Workplace Relations Policy Group, Department of Employment

O'SULLIVAN, Mr Jeremy, Senior Executive Lawyer, Workplace Relations Legal Group, Department of Employment

PARKER, Ms Sandra, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment