

**ACTU Submission**  
**to the Senate Committee on Education and**  
**Employment regarding the Fair Work**  
**Amendment Bill 2014**



## Introduction

The Australian Council of Trade Unions (**ACTU**) is the peak body representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.

We welcome the opportunity to make submissions to the Senate Committee on Education and Employment regarding the provisions of the Fair Work Amendment Bill 2014 (**Bill**).

The Bill contains a range of amendments to the Fair Work Act 2009 (**Act**) that will have a detrimental impact on Australian workers and their families.

These amendments include:

- the abolition of important safeguards on Individual Flexibility Arrangements (**IFAs**), enabling businesses to utilise individual contracts in a similar manner to AWAs to drive down wages and conditions and exploit vulnerable employees;
- changes to the National Employment Standards (**NES**) to restrict payment of accrued annual leave entitlements on termination;
- the introduction of new provisions that over-ride state laws permitting employees to accrue and take various forms of leave whilst in receipt of workers' compensation payments;
- changes to the transfer of business provisions to reduce entitlements for workers that seek to retain their job when a business is sold or transferred to a new employer;
- removal of the long-standing fundamental right to take industrial action to secure improved terms and conditions of employment where an employer refuses to engage in collective bargaining;
- restrictions on the operation of good faith bargaining in relation to greenfields agreements;
- undermining employee rights to representation by restricting union right of entry for the purposes of discussion with employees; and
- limiting access to a fair hearing in unfair dismissal matters.

The ACTU believes that the Bill goes well beyond the public policy position that was outlined by the Coalition prior to the 2013 election and seeks to bring back key elements of the WorkChoices regime. Prior to the 2013 election the Coalition published a policy document which states that:

*"The details of the Coalition's Policy to Improve the Fair Work Laws are spelled out clearly in this document. Based on the laws as they stand now, the Coalition has no plans to make any other changes to the Fair Work Laws."*

...

*The Coalition also said that it would not change the amendments made to the Act in 2013 except as “spelled out” in their Policy.”<sup>1</sup>*

It is clear that the Coalition has gone beyond these statements in relation to a number of the proposals in the Bill. This submission examines each of the proposed changes below.

This submission also outlines the ACTU's views in relation to the various recommendations made by the Fair Work Review Panel (**Panel**) which the Bill seeks to implement and the likely effect on workers of the proposed changes to the Act.

The Bill is clearly not consistent with the Coalition's policy. There is either a clear intention on the part of the Coalition to go beyond their policy position or the policy was deliberately misleading. The lack of detail in the policy likely obscured the Coalition's intentions for the Act and made it almost impossible at the time the policy was disseminated to determine how it would ultimately manifest as a Bill.

We submit that the Committee should recommend to the Senate that the Bill be rejected in its entirety.

## **Part 1 – Unpaid parental leave**

The ACTU submits that the provisions of the Act as they currently stand appropriately govern unpaid parental leave. S 76 of the Act currently provides 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. Requests must be in writing, and responses by the employer must be in writing. Requests may only be refused on “reasonable business grounds”, however the provisions suffer from the limitation that disputes concerning such matters may not be resolved by a third party in the absence of a provision in an enterprise agreement or other instrument providing for such resolution.

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. The Explanatory Memorandum to the 2014 Bill (**EM**) indicates that a meeting need not be undertaken face-to-face but can also be conducted by other means e.g. over the telephone.<sup>2</sup>

While the ACTU supports 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.

It cannot be assumed that due consideration will be given by the employer to a reasonable request merely because a meeting is held between the employer and employee. The proposed requirement to provide an opportunity to discuss a request is unlikely to lead to meaningful discussions in circumstances where an employer is able but unwilling to accommodate a request.

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<sup>1</sup> The Coalition's Policy to Improve the Fair Work Laws, May 2013, p 11. Available at <http://paweb-static.s3.amazonaws.com/Policies/FairWork.pdf>

<sup>2</sup> Explanatory Memorandum to the Fair Work Amendment Bill 2014, xlii

Research conducted by the General Manager of Fair Work Australia, as the Fair Work Commission (**Commission**) was then known, indicates that the majority (93.3%) of requests for extensions of unpaid parental leave made in accordance with the provisions of the NES are being granted.<sup>3</sup> However it remains important that the reasons for refusal be scrutinised.

There also appears to be a small proportion of eligible employees that would like to take a period of parental leave beyond the initial 12 months that did not make a request because they were concerned 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%).<sup>4</sup> This suggests that in some cases employees are being actively discouraged from making a formal request for an extension of unpaid parental leave.

There is also a great deal of anecdotal evidence from women returning from maternity leave that requests for flexible working arrangements are being denied. Although less men seem to request a flexible work arrangement or an extension to parental leave, those who do are more likely to report a cultural bias against men seeking flexible work arrangements to care for family or children.

Because employers are aware that they are not obliged to demonstrate that they have seriously considered a request, the success or otherwise of an employee's request is by and large subject to the vagaries of the attitudes of their line manager. Frustratingly, in many instances managers show a lack of interest, care or incentive to try to accommodate the employee's request. Often refusals simply are not justified even where an employee has made arrangements to facilitate the request, such as finding someone willing to job share with them.

The ACTU submits that unless the grounds for refusal are subject to independent scrutiny, it will remain possible for employers to 'go through the motions' of arranging a meeting in order to simply assert reasonable business grounds as the basis for refusal.

## Part 2 – Payment for annual leave

Currently, s 90(2) provides that an employee with a period of untaken paid annual leave is entitled to be paid the amount that would have been payable had the employee taken the period of leave. The ACTU submits that the Act operates appropriately in its current form.

An employee is currently entitled to be paid their base rate of pay plus, where an entitlement to leave loading and/or higher rate of pay exists, that leave loading and/or higher rate, on the whole of their accrued annual leave upon the termination of their employment. The higher rate of pay may include the matters set out in s 18 which defines "full rate of pay". An employee's full rate of pay is defined as the rate of pay payable for ordinary hours of work including payment for incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other

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<sup>3</sup> 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

<sup>4</sup> Ibid, Table 6.9

separately identifiable amounts. S 16 defines an employee's "base rate of pay" as excluding the matters which s 18 includes.

The Panel made Recommendation 6 that "[A]nnual leave loading should not be payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect".<sup>5</sup> When in opposition the Coalition said it would implement Recommendation 6, adding that "[T]his will clarify circumstances where annual leave loading is payable on termination to address existing confusion and restore the conventionally accepted approach".<sup>6</sup> The relevant sections of the EM refer only to annual leave loading<sup>7</sup> and the Regulatory Impact Statement similarly refers only to changing the position with respect to the payment of leave loading. Clearly however, the terms of the Bill vastly overstep the area of leave loading and mean that full rate of pay matters like allowances and loadings will also be excluded. The impact of this provision will vary depending on the wording in modern awards and enterprise agreements, and interpretative arguments concerning ambulatory versus point in time references.

S 55(4) deals with ancillary and supplementary terms that may be included in a modern award or enterprise agreement. The Bill proposes to insert a new note (c) into Note 2 which introduces an additional example of a supplementary term which may be included in a modern award or enterprise agreement. This new note provides that when the employment of an employee is terminated and that employee has a period of untaken paid annual leave the employee can be paid the amount that would have been payable had the employee taken the period of leave. The new note goes on to say that the amount payable to the employee may be higher than their base rate of pay as provided for in the proposed new s 90(2).

The new note under s 55(4) operates to ensure that it is clear that payments made to an employee pursuant to s 90(2) at the time of the termination of their employment at the employee's full rate of pay are optional, rather than mandatory. This reverses the current mandatory safety net entitlement to an optional, or circumstantial, "extra". It removes an NES benefit that employees currently enjoy, and in some cases, may have come to rely on since its introduction.

Proposed new s 90(2) removes the current requirement that when the employment of an employee who has a period of untaken paid annual leave ends the employee is to be paid the amount that would have been payable to the employee had he or she taken the period of leave, that is, his or her full rate of pay. As submitted, this full rate of pay includes annual leave loading, allowances and other penalties and loadings. This change is a significant deviation from the Coalition's proposal to clarify that annual leave loading is only to be paid on the termination of employment where an industrial instrument so provides. This is also a significant departure from the Panel's Recommendation 6.

The Bill provides that the rate to be paid under proposed s 90(2)(b) must not be less than the employee's base rate of pay that applied immediately prior to the termination of the employee's employment. This allows for an employer to opt to pay a higher rate, say for example, the full rate of

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<sup>5</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 100

<sup>6</sup> The Coalition's Policy to Improve the Fair Work Laws, May 2013, p36

<sup>7</sup> See Part 5 of the EM

pay, but it does not mandate it. The option of payment of a higher rate of pay will be left up to the industrial parties to determine either at the time a modern award is reviewed, or an industrial instrument is created.

The Bill also inserts a new note after s 90(2) which refers back to s 55. It appears that the intention of this new note is to make it clear that s 90(2) operates to clarify that there is no inconsistency between the terms of the NES and an industrial instrument where that industrial instrument sets out what rate is payable to an employee at the time of the termination of his or her employment.

In many cases the drafting of the relevant clause in the industrial instrument may not be clear and more than one interpretation may be open. Currently it is assumed that the terms of an enterprise agreement passed the BOOT at the time of approval and would not be in breach of the current terms of s 90(2). In such cases it can be safely assumed that payment at the time of termination of employment is to be in accordance with s 90(2). The proposal means that at the time of termination of employment, the guidance which is currently provided by s 90(2) will be gone. The parties will then be left to resolve a dispute, a process which can, in some cases, be costly and administratively burdensome. Such disputes could be prevented if the wording of s 90(2) was clarified, as per our proposal below.

Some modern awards already clearly provide that an employee with a period of untaken paid annual leave is entitled to payment of leave loading on termination of employment.<sup>8</sup> Some modern awards say the reverse.<sup>9</sup> Some are silent on this matter.<sup>10</sup> Regardless, s 90(2) has been interpreted as requiring that payment at the full rate of pay is required where the employment of an employee with a period of untaken paid annual leave ends.<sup>11</sup>

We submit 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.

It is proposed that the amendment take effect the day after the Bill is given Royal Assent, and will apply to all terminations of employment which occur after that date. There is no proportional accrual or grandfathering provided for. This is particularly unfair as some employees will lose entitlements they have accrued during the course of their employment. What the Bill will do is provide an overnight windfall gain to a significant number of employers.

The effect of removing the current entitlement is particularly unfair to employees who are employed under a modern award. These employees are paid relatively low rates and are likely to rely on the payment for untaken paid annual leave at the full rate of pay at the time of the termination of their employment.

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<sup>8</sup> See for example the Aluminium Industry Award 2010, the Banking, Finance and Insurance Award 2010, the Fast Food Industry Award 2010, and the Poultry Processing Award 2010.

<sup>9</sup> See for example the Waste Management Award 2010.

<sup>10</sup> See for example the Miscellaneous Award 2010.

<sup>11</sup> See advice to the [Fair Work Ombudsman by Mr J Phillips SC, as tabled before the Senate, Employment and Workplace Relations Committee, Additional Budget Estimates 2010-11](#)

Employees should not be financially disadvantaged because they have not taken their full entitlement to paid annual leave at the time their employment ends. There may be many reasons why an employee has not taken some or all of their entitlement to paid annual leave. For example, there may be work pressures which mean they cannot take the paid annual leave such as overwork or no replacement employee, or they may feel that their employment is insecure and taking a period of paid annual leave could jeopardise their position.

There should be no penalty or detriment for an employee who has not taken their paid annual leave during their employment when their employment ends. The Bill creates an incentive for employers to deny, either overtly or covertly, an employee their full entitlement to paid annual leave during employment so that upon the termination of the employee's employment the cost of the annual leave is less than if the employee had taken it while employed. This incentive runs directly contrary to the recognised industrial merit and purpose of annual leave, being that the provision of rest and recreation time to workers benefits those workers as well as their employers. This merit was accepted in the federal award system in 1936,<sup>12</sup> and by 1945 had become accepted across the industrial relations spectrum from Unions to employers and even the Institute of Public Affairs.<sup>13</sup>

Importantly, the proper accounting treatment of annual leave entitlements is that provision be made for the full value of accrued annual leave (including annual leave loading) as a liability on an employer's balance sheet. We also note that the employer can claim a tax deduction when payments are made to an employee. The effect of the Bill is to relieve employers of a portion of the annual leave obligation that they are currently required to show as a liability; a significant and unjustifiable "free kick" at the expense of employees.

### **Part 3 – Taking or accruing leave while receiving workers' compensation**

S 130 of the Act currently provides a broad prohibition on an employee taking or accruing any leave (other than unpaid parental leave) while receiving workers' compensation payments. We submit that employees should be entitled to accrue and take all types of leave where the relevant workers' compensation legislation does not expressly prohibit it.

S 130 of the Act prohibits the taking or accruing of the following types of paid and unpaid leave:

- annual leave;
- paid and unpaid personal/carer's leave;
- paid and unpaid compassionate leave;
- public holidays;

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<sup>12</sup> Printing and Allied Trades Employers Federation of Australia & Anor v. Printing Industry Employees Union of Australia & Ors (1936) 36 CAR 738 at 747

<sup>13</sup> Metal Trades Annual Leave Case (1945) 55 CAR 595 at 597

- award-derived long service leave;
- unpaid community service leave; and
- paid community service leave (jury service pay).

The broad prohibition is subject to an exemption in cases where the law under which the workers' compensation is paid permits the taking or accruing of such leave while in receipt of that compensation. The Bill would remove that exclusion. Recommendation 2 of the Panel was that "section 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments".<sup>14</sup> The Coalition policy was to implement Recommendation 2, and it said "[T]his will clarify the interaction between workers' compensation and annual leave pursuant to s.130".<sup>15</sup>

Clearly this provision of the Bill is a further example of overreach because neither the Panel nor the Coalition suggested any reform in this area in relation to any type of leave other than annual leave; and 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 WorkChoices did not go this far: it allowed annual leave to be taken and accrued unless the relevant workers' compensation law prohibited it.<sup>16</sup> This meant that workers in most jurisdictions were able to take and accrue annual leave. The current s 130(2) modified the position under WorkChoices by requiring that the relevant workers compensation law expressly permit the taking and accruing of leave.

It is proposed that the amendment take effect the day after the Bill is given Royal Assent, to employees who commence a period of workers' compensation after that period.

The only state where it is clear that employees can take and accrue annual leave, sick leave and long service leave while in receipt of workers compensation is Queensland.<sup>17</sup> Victorian employees can take accrued annual leave or long service leave while in receipt of workers compensation payments, however, the general position is that they cannot accrue these kinds of leave.<sup>18</sup> Employees in New South Wales appear to be unable to take or accrue annual leave as the relevant legislative provision does not impose a right to do so.<sup>19</sup> In relation to Comcare, there are explicit rights to accrue sick leave and annual leave for at least 45 weeks of a compensation period.<sup>20</sup> Because the rights and entitlements of employees in different jurisdictions vary, it is difficult to say with certainty the extent of the potential disadvantage to be suffered by employees as a result of the proposal. This is particularly so when the provision of the relevant workers' compensation legislation is open to different interpretations. This proposed amendment will disadvantage those employees who can

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<sup>14</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 89

<sup>15</sup> The Coalition's Policy to Improve the Fair Work Laws, May 2013, p 36

<sup>16</sup> Workplace Relations Act 1996 (Cth) s 237

<sup>17</sup> Workers' Compensation and Rehabilitation Act 2003 (Qld), s 119A

<sup>18</sup> Accident Compensation Act 1985 (Vic), s 97

<sup>19</sup> Workers Compensation Act 1987 (NSW), s 49

<sup>20</sup> Safety, Rehabilitation and Compensation Act 1988, s. 116



currently take and/or accrue different types of leave while in receipt of workers' compensation payments.

S 27(2)(g) of the Act provides that workers' compensation and long service leave are not matters excluded by s 26. This means that state and territory workers' compensation and long service leave provisions should continue to apply to employees. The only exception to this is long service leave provisions caught by Division 9 of Part 2-2. Not only does the proposal to delete s 130(2) go further than the Panel's recommendation and the Coalition's pre-election policy, it effectively encroaches on the rights of the states and territories to govern workers' compensation and long service leave, introducing a direct conflict of laws contrary to the "field" otherwise signposted by the Act.

An employee receives workers' compensation payments from an insurer or under a scheme if he or she has been injured or has become ill in the course of employment. But for the illness or injury the employee would be at work accruing leave, and potentially taking the leave available to them. To remove this entitlement, particularly given that an employee in receipt of workers' compensation has not chosen to be in such a position, is unjust. In most cases, while an employee receiving workers' compensation payments may not be paid by their employer, they are still engaged by their employer. They should not be left in a position where they are unable to work and are also suffering disadvantage because they are also denied the ability to accrue and take leave.

Further, denying an employee the ability to accrue and/or take annual leave while they are in receipt of workers' compensation payments has the potential to exacerbate their injury or illness. A period of recovery from an injury or illness is different to a period of rest and recreation away from work as a fit and healthy person. The two types of leave are different and perform different functions. Failure to have sufficient holidays can increase the risk of workplace injuries and illnesses, thus creating a cycle of injury and/or illness. There are significant occupational health and safety risks associated with overworked employees including stress and fatigue. These risks would likely be increased if an employee is denied the ability to accrue and take annual leave while in receipt of workers' compensation payments. There are significant costs associated with occupational health and safety and workplace injury and annual leave is a way for employers to avoid these risks and costs while at the same time having a safe workplace.<sup>21</sup>

An employee in receipt of workers' compensation payments may rely on their accrued paid personal/carer's leave, or other types of paid leave, to make ends meet, particularly should their weekly workers' compensation payments be reduced over time. Removing the current entitlements will put increased financial pressure on these workers to go back to work before they are fit which defeats the very purpose of workers' compensation. Further, an employer may wish to allow an employee to take a period of annual or long service leave while the employee is in receipt of workers' compensation payments, this may particularly be so where an employee has a large bank of accrued annual or long service leave.

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<sup>21</sup> See Grant Cairncross and Iain Weller, *Not Taking Annual Leave: What Could it Cost Australia?*, *Journal of Economic and Social Policy*, 9(1) 2004, 11-13

We submit that the most appropriate proposal is for employees to be able to accrue and take all types of leave so long as the relevant workers' compensation legislation does not expressly prohibit it.

We add that we find it curious that the relevant Part of the Bill that proposes these changes is not discussed in the Regulatory Impact Statement, notwithstanding it is very clear intersection with the Comcare system, particularly at a time when the government is pursuing a policy to open up Comcare to the general market.

## Part 4 – Individual Flexibility Arrangements

The Bill opens the way for a return to the most insidious aspects of individual statutory arrangements which were seen under WorkChoices and were emphatically rejected by Australians in 2007. The Bill systematically dismantles the protections inserted by the Act to ensure that legitimate flexibility is exercised in a way which is not detrimental to employees.

There is currently enormous scope within industrial instruments to cater for the flexibility requirements of employers and employees. We submit that the scope for flexibility within industrial instruments removes any need for IFAs. For example the General Retail Industry Award provides that ordinary hours of work are between 7 am until 9 pm Monday to Friday, 7 am to 6 pm Saturday, and 9 am to 6 pm Sunday. Employers such as newsagencies and video shops are subject to specific hours relevant to their industries. Further, in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.<sup>22</sup>

Further, the Manufacturing and Associated Industries and Occupations Award includes a span of hours of between 6.00 am and 6.00 pm which may be altered by up to one hour at either end by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.<sup>23</sup>

The Act provides that modern awards and enterprise agreement must include a flexibility term that enables an employee and his or her employer to agree to an IFA that varies the effect of the applicable award or enterprise agreement in order to meet the genuine needs of the parties and sets out the terms of the relevant instrument which may be varied by an IFA.

Amendments are proposed to the flexibility term in awards and agreements, and to the enforcement and termination of IFAs.

These amendments undermine a number of safeguards that were designed to address significant problems associated with Australian Workplace Agreements (**AWAs**) made under the *Workplace*

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<sup>22</sup> General Retail Industry Award 2010, cl 27

<sup>23</sup> Manufacturing and Associated Industries and Occupations Award 2010, cl 36

*Relations Act 1996 (WR Act)* and which ensured that IFAs could not be used by employers to exploit vulnerable employees or drive down wages or conditions of employment.

In order to properly understand the consequences of the proposed amendments to the Act, it is necessary to briefly revisit the operation of AWAs and the effect that these arrangements had on terms and conditions of employment during the WorkChoices era.

### **Individual Bargaining under WorkChoices**

Individual statutory contracts, known as AWAs, were first introduced by the WR Act.

AWAs operated to the exclusion of the relevant award or enterprise agreement and, following the implementation of WorkChoices, could apply for a period of up to 5 years.

The no disadvantage test, which ensured that AWAs did not on balance disadvantage an employee compared to the relevant award, was abolished under WorkChoices and replaced with five minimum standards known as the Australian Fair Pay and Classification Standard (**AFPCS**). These five standards were: a minimum hourly rate, 4 weeks' annual leave per year (2 weeks of which could be 'cashed out'), 10 days sick/carer's leave, a 38 hour working week (which could be averaged over a 12 month period in order to avoid payment of overtime rates for additional hours worked); and 52 weeks' unpaid parental leave. Other award entitlements were no longer 'protected' by law. Consequently an AWA could be made that stripped away basic award conditions, such as penalty and overtime rates, allowances and consultation rights.

The absence of unfair dismissal protections for workers of businesses with less than 100 employees and the introduction of 'operational reasons' as an insurmountable ground for dismissal enabled businesses to dismiss employees that refused to accept an AWA and replace them with employees on lower wages and conditions.

Workers could be compelled to accept an AWA that removed entitlements as a condition of employment or promotion. There was clearly no real choice on the part of an employee seeking a job whether or not to accept an AWA. The existence of a collective agreement under these arrangements offered very little protection against coercion or undue pressure being applied to individual employees to accept an AWA. WorkChoices permitted employers to undercut bargained entitlements by systematically implementing AWAs with individual employees.

The rhetoric of 'individual' flexibility for workers was used to promote AWAs however, in practice, AWAs provided employers with an extremely effective means of avoiding their legal obligations, undermining the safety net and exploiting vulnerable employees.

At the end of December 2007, the Workplace Authority estimated that around 880,000 employees (9.6 per cent) were on AWAs.<sup>24</sup> The majority of AWAs were made with employees in low paid

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<sup>24</sup> Lodgement Data cited in the Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

sectors of the economy. The retail, hospitality and personal services sectors accounted for 55% of all AWAs lodged.<sup>25</sup>

Analysis of a sample of 250 AWAs (out of 6263 lodged between 27 March and 30 April 2006) shows that all AWAs removed at least one protected award condition and 16 per cent excluded all protected award conditions.<sup>26</sup>

Further data compiled by the Workplace Authority shows that 89 per cent of the 1,748 AWAs lodged between April and September 2006 removed at least one protected award condition, 71 per cent excluded four or more, 52 per cent excluded six or more and 2 per cent excluded all protected award conditions. The protected conditions that were removed by AWAs included:

- penalty rates (65%);
- annual leave loading (68%);
- shift work loadings (70%);
- overtime loadings (49%);
- State/Territory public holidays (25%);
- days off work as a substitute for working on a public holiday (61%);
- public holiday penalties (50%);
- rest breaks (31%);
- allowances (56%); and
- bonuses (63%).<sup>27</sup>

The rate at which conditions were being removed was substantially higher under WorkChoices AWAs than under pre-Work Choices AWAs and overtime and penalty rates were particular targets for removal. In the case of overtime pay, the rate at which this was removed through AWAs doubled from a quarter of AWAs in 2002-03 to over a half of AWAs in 2006.<sup>28</sup>

Employers commonly used AWAs to increase hours of work. The average AWA employee worked a 13% longer week than their peers employed under collective arrangement.<sup>29</sup> Often employees on AWAs worked longer hours for less pay. For example in New South Wales, female AWA employees

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<sup>25</sup> Workplace Authority, 'Lodgement Data: 27 March 2006–30 September 2007' (2007) p 5.

<sup>26</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

<sup>27</sup> The Hon Julia Gillard MP, AWA Data the Liberals claimed never existed, media release, 20 February 2008. Note that the media release relied upon Office of the Employment Advocate data examined between April and October 2006.

<sup>28</sup> David Peetz and Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data' (2007) p 4.

<sup>29</sup> ABS cat 6306.0 (May 2006) p 33.

worked 4.4% longer hours than their counterparts engaged under collective agreements, but earned 11.2% less.<sup>30</sup>

It was also common practice not to provide any wage increase over the life of the AWA. 22 per cent of AWAs in April 2006 contained no provision for a wage increase during the life of the agreement and this figure rose to 34 per cent in April-September 2006.<sup>31</sup>

In industries, where award wages were not a good reflection of market wages, the wage loss suffered by a typical worker can be inferred by comparing AWA wages to the wages payable to workers employed under collective agreements. In 2006, the median AWA worker earned 16.3% less per hour than the comparable worker on a collective agreement.<sup>32</sup>

In award-dependent industries, the removal of minimum conditions resulted in average wage outcomes for some workers that were even lower than the minimum award rate. For example, in the hospitality industry, average AWA earnings in 2004 and 2006 were 1.8 and 1.6 per cent below average earnings of workers reliant on the award minimum respectively.<sup>33</sup>

Employees most negatively affected by AWAs included women, low-skilled workers, employees in small firms and workers with little bargaining power. Women on AWAs earned less than women on collective agreements in every state, by margins ranging from 8 to 30 per cent<sup>34</sup> and female casual workers on AWAs received average earnings some 7.5% below average award earnings.<sup>35</sup>

The experience of AWAs clearly demonstrates that the assumption of a level playing field where employees negotiate wages and conditions with their employers is a myth. Employees face a significant power imbalance that affects all aspects of the employment relationship. They were, and are, likely to be unaware of their rights in relation to individual statutory contracts especially their right to refuse to make an agreement, and are not always well placed to make an assessment of whether an arrangement disadvantages them.

Employees are generally reluctant to challenge their employer, either by opposing the making of an agreement at the employer's insistence, or else in seeking compensation for disadvantage suffered under the terms of an agreement. Unless an employee is supported by a union, has skills which are in demand or is an unusually confident and assertive individual, it is unlikely that an employee would have been able to negotiate fair terms and conditions of employment.

On the other hand, it is overwhelmingly employers who initiate the use of individual statutory agreements. Employers seek agreements that provide them with increased discretion to set the terms and conditions of work. They commonly provide inadequate compensation for the removal of monetary entitlements particularly where there is no external assessment of the sufficiency of the

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<sup>30</sup> ABS cat 6306.0 (May 2006) Table 10.

<sup>31</sup> David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 64.

<sup>32</sup> Peetz and Preston, p 13.

<sup>33</sup> David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 67.

<sup>34</sup> Ibid, p 29.

<sup>35</sup> Ibid, p 67.

compensation, and generally offer no compensation for non-monetary disadvantage suffered by the employee such as the employee's increased subjection to the exercise of managerial discretion. Employers will apply pressure to employees to accept their preferred agreement especially if they are permitted to make 'take it or leave it' offers to new employees, and some employers may apply pressure amounting to coercion even though this would be unlawful.

Non-compliance with employment obligations and lack of enforcement by employees is particularly prevalent in industries where the employer is under competitive pressure to reduce labour costs such as parts of manufacturing, hospitality and retail and particularly in the case of vulnerable workers including young workers, women, those working in precarious employment, outworkers and employees working in workplaces without a union presence.

### **Individual Bargaining under the Act**

When the Act was introduced, a number of important safeguards on the operation of IFAs were included. The Act requires that IFAs:

- must be genuinely agreed to by both parties;<sup>36</sup>
- must result in the employee being better off overall than they would have been had no agreement been made;<sup>37</sup>
- can only be made after the employee has commenced employment;<sup>38</sup>
- must be in writing and be signed by the employee and the employer. If the employee is under 18, the IFA must also be signed by a parent or guardian. The employer must ensure that a copy of the IFA is given to the employee;<sup>39</sup>
- may be terminated by either party giving written notice or immediately if the parties agree.<sup>40</sup>

The content of an IFA must also comply with the flexibility term contained in relevant modern award or enterprise agreement. The model flexibility term contained in all modern awards limits the award provisions that can be varied by an IFA to the following matters: arrangements about when work is performed; overtime rates; penalty rates; allowances and leave loading.<sup>41</sup>

The terms that may be included in an IFA varying the effect of an enterprise agreement is a matter for bargaining. The Act requires all agreements to contain a flexibility clause that sets out which matters may be the subject of an IFA.<sup>42</sup> If the enterprise agreement does not include a flexibility term, the model flexibility term in the Fair Work Regulations is taken to be a term of the

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<sup>36</sup> s144(4)(b), 203(3)

<sup>37</sup> s144(4)(c), 203(4)

<sup>38</sup> s144(4)(d), Modern award clause 7.2

<sup>39</sup> s144(4)(e), 203(7)

<sup>40</sup> s144(4)(d), 203(6)

<sup>41</sup> Modern award clause 7.2

<sup>42</sup> 203(2)(a)

agreement.<sup>43</sup> The model agreement flexibility term contains the same matters as model award flexibility term.

Unions did not support the introduction of IFAs, notwithstanding the formal safeguards that accompanied them. Since that time, it has become apparent that in spite of these safeguards IFAs are being used by employers in a similar fashion to AWAs – that is, to drive down wages and conditions and exploit vulnerable employees.

The most comprehensive source of data on IFAs to date is the report of the General Manager of Fair Work Australia, as the Commission was then known, published in November 2012.<sup>44</sup> The report contains an analysis of the extent to which IFAs are agreed to and the content of those arrangements. Sources used to inform the report include:

- a survey of 2650 employers across a range of locations, employer sizes and industries;
- a survey of 4500 employees from across Australia, sources from a range of industries;
- qualitative analysis of individual IFAs submitted to the general manager by employers; and
- submissions from interested parties.

The responses provided by survey participants confirm that employers are generally better informed than employees about the provisions of the Act with respect to agreement making and are well placed to control the agreement making process.

- 54 per cent of all employers are ‘aware that employers can have an IFA with an employee that varies the effect of the modern award or an enterprise agreement that applies to an employee’ compared with 35 per cent of employees.<sup>45</sup>
- Employers reported that most reviews, modifications and terminations of IFAs were employer-initiated (around 70 per cent).<sup>46</sup>
- The drafting process is largely controlled by employers. 85-88 per cent of employers are involved in drafting the content of IFAs compared with approximately 36-38 per cent of employees.<sup>47</sup> Multiple IFA employers also commonly receive assistance from employer associations and external consultants, particularly in relation to IFAs that vary the effect of a modern award.<sup>48</sup>

More significantly, the research reveals that IFAs are being used in a manner that is expressly prohibited by the Act.

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<sup>43</sup> 203(4),203(5)

<sup>44</sup> General Manager’s Report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012, (2012).

<sup>45</sup> Figure 4.1, Table 4.1.

<sup>46</sup> Table 4.4, Table 4.7

<sup>47</sup> Table 4.3, Table 4.6

<sup>48</sup> Table 4.6

The majority of multiple IFA employers (54 per cent) admitted that they required all employees to sign IFA documentation to either commence or continue their employment.<sup>49</sup> For employers that had made an IFA with only one employee, around 35 per cent indicated they had required an employee to sign the IFA to commence or continue employment.<sup>50</sup> Such conduct is inconsistent with the requirement that the employer and individual employee must have ‘genuinely agreed’ to make the IFA, without coercion or duress.

Participants in the employer survey were asked if they had assessed whether their employees were better off overall as a result of their IFA. The results show that a significant proportion of employers made no effort to comply with their legal obligations under the Act. 18 per cent of single IFA employers and 27 per cent of multi-IFA employers reported that they did not assess whether the employee was better off overall.<sup>51</sup>

Participants in the employee survey were asked whether they considered themselves to be better off overall as a result of the IFA. Not surprisingly, a significant proportion (17%) reported that they did not consider themselves to be better off overall.<sup>52</sup>

These findings highlight the fact that existing safeguards of the use of IFAs are relatively ineffectual as a means of protecting employees. The absence of external scrutiny in relation to the process of making and the content of IFAs enables employers to pressure employees to accept substandard IFAs that reduce wages and conditions.

The ACTU believes that the findings contained in the report tend to understate the extent to which IFAs are being utilised to exploit employees. For obvious reasons, employers that are aware of their legal obligations may be inclined to disguise non-compliance. On the other hand, it is likely that a significant number of employees surveyed may be unaware that an IFA removes entitlements contained in a modern award or enterprise agreement.

Since the Act was enacted, the ACTU and its affiliates have had numerous reports of IFAs that clearly disadvantage employees compared to the relevant award or enterprise agreement.

For example in 2011, United Voice sued the Spotless Group over two suspect IFAs. Under one of the arrangements, employees agreed that if other workers were absent on sick leave, Spotless could contact them and direct them to work the shift, waiving their rights to the usual 7 days’ notice and overtime rates of pay. They received no compensation, except ‘the opportunity to earn a higher income’. The matter was settled and the union is party to a Deed of Release that prohibits discussion of the substance of the Deed or the circumstances surrounding the settlement. Nevertheless, the statement of claim outlining the allegations against Spotless is a matter of public record and provides evidence of the kinds of IFAs that exist.

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<sup>49</sup> Table 4.6

<sup>50</sup> Table 4.3

<sup>51</sup> Table 5.5, Table 5.7

<sup>52</sup> p 71



Another specific example of which the ACTU is aware relates to offers made by Medibank Private to its employees to work from home on the condition that the employee agrees to forgo the entitlement to overtime rates under the terms of the relevant collective agreement.

In our submission such arrangements clearly do not pass the Better Off Overall Test (**BOOT**). Yet employer organisations frequently assert that non-monetary entitlements such as arrangements that provide ‘the opportunity to earn extra income’ or that otherwise ‘meet employee needs’ can be used to offset the loss of financial entitlements such as penalties and loadings.

Anecdotal evidence suggests that the use of IFAs to remove award entitlements is prevalent in low-paid industries such as the cleaning, aged care, and disability sectors. The ACTU understands that in these industries IFAs are commonly used to alter penalty rates, overtime and allowances or modify award provisions that regulate hours of work, for example by removing minimum engagement provisions or increasing the maximum number of days that an employee can work consecutively without payment of overtime.<sup>53</sup>

There have also been a number of high profile cases which demonstrate that unfair practices persist. An audit conducted by the Fair Work Ombudsman in 2011 to assess the level of award compliance in the Queensland Pharmacy Industry confirmed the use of what appeared to be a ‘standardised’ or template-driven IFAs being used by a small number of employers. As the report notes, the template approach raises questions as to whether the IFAs were produced following genuine negotiation.<sup>54</sup> Moreover, such an approach does not demonstrate appetite by the employer for flexibility, but rather a preference for all employees to be on identical conditions of employment chosen by the employer.

Further, the ACTU notes that there has been at least one prosecution under the general protections provisions of the Act that involved an IFA. The general protections provisions of the Act prohibit employers exerting undue influence or undue pressure on an employee in relation to a decision to make or terminate an IFA. Civil penalty provisions also apply to employers that coerce an employee to exercise a workplace right in a particular way or take adverse action against an employee because of a workplace right.

In *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd*,<sup>55</sup> six employees were asked to sign IFAs that removed penalty rates for overtime, weekend and public holiday work. Five of the six employees signed the agreement. One of the employees signed only after the director threatened that there would be no work for him if he did not sign. Another employee had his shifts cut following his refusal to sign. The company also admitted that the information provided to employees failed to comply with s 45 of the Act. The court fined the operators of the company a total of \$30 000.

While the penalties awarded in this case may have discouraged some employers from using heavy-handed tactics to persuade employees to accept an IFA, the ACTU remains concerned about the risk of coercion in non-unionised, award-dependent workplaces particularly with respect to vulnerable workers.

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<sup>53</sup> These observations are based on an analysis of IFAs compiled by United Voice

<sup>54</sup> Fair Work Ombudsman, ‘Qld - Pharmacy Industry Audit Program Report 2011’, (2012) 11

<sup>55</sup> [2011]FCA 1064

Sophisticated employers that wish to avoid their legal obligations are likely to avoid using template agreements and apply pressure in more subtle ways for example by treating employees that refuse an IFA less favourably or informing other employees that the refusal is causing financial difficulties for the business.

The process by which agreement is reached is generally not subject to external scrutiny and consequently all but the most egregious breaches are likely to remain undetected.

### **The Proposed Amendments**

The existing issues identified with the abuse and manipulation of IFAs will only be exacerbated by the changes proposed in the Bill. Not only will abuse and manipulation increase, it will remain undetected and unable to be acted upon should the Bill be passed.

The Bill contains a number of significant changes to the provisions governing IFAs. In summary the Bill:

- requires flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of IFAs with 13 weeks' notice;
- requires flexibility terms in enterprise agreements to provide, as a minimum, that IFAs may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading;
- "clarifies" that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employee is better off overall under an IFA;
- requires IFAs to include a statement by the employee setting out why he or she believes that the arrangement meets his or her genuine needs and leaves him or her better off overall at the time of agreement to the arrangement;
- provides a defence to an alleged contravention of a flexibility term where the employer reasonably believed that the requirements of the term were complied with at the time of agreeing to a particular IFA.

The proposed amendments contained in the Bill with respect to IFAs undermine existing protections for employees. If accepted, these amendments will enable employers to make agreements that bear a remarkable resemblance to AWAs and have very similar consequences for employees.

We also note that the Coalition's policy provided that workers "can ask for fair and protected flexible working arrangements if they want" or "if they ask for one".<sup>56</sup> The Bill evinces nothing to this effect.

The consequence for employees of each of the proposed amendments is discussed further below.

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<sup>56</sup> The Coalition's Policy to Improve the Fair Work Laws, May 2013, pp 7 and 27

### **Unilateral Termination with 13 weeks' notice**

The unilateral termination period for IFAs made under awards is currently set by the model clause in awards. Currently, the minimum unilateral termination period set by the Commission is 13 weeks. For agreements, the minimum unilateral termination period set by the Act is 28 days.

The Bill requires flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of IFAs with 13 weeks' notice.

Unilateral termination is an important safeguard that helps to prevent abuse of IFAs. IFAs are intended to be mutually beneficial for both parties. If an IFA is no longer meeting this objective, the parties to it should be able to terminate the arrangement. This is particularly important given that the process by which agreement is reached and the content of any such agreements are generally not subject to external scrutiny.

The notice period which applied to both kinds of IFAs was originally set at 28 days. The notice period contained in the model flexibility clause in modern awards was altered by the Commission in 2012 in response to concerns raised by employers that the capacity for an employee to unilaterally terminate an IFA with 28 days' notice limits the certainty of agreements and operates as a disincentive to use IFAs.<sup>57</sup>

However, there is little evidence to support the contention that the four weeks' notice period acts as a disincentive for employers to enter into IFAs.<sup>58</sup> The General Manager's Report on IFAs found that less than one per cent of employers surveyed who were aware of, but did not make an IFA, cited the four weeks' notice period as the reason why they had not entered into an IFA. The most common reason, reported by just over half of employers, was that there had been no identified need to enter into an IFA.<sup>59</sup>

Moreover, as the Commission noted, the certainty afforded to both parties by a longer notice period must be weighed against other matters including the need to protect employees who through ignorance or for some other reason make an agreement that which materially disadvantages them and ensure that unforeseen developments that render a flexibility agreement not only unacceptable to one of the parties but also substantially unfair can be addressed.<sup>60</sup>

The operation of a lengthy notice period has significant consequences for employees that are financially worse off under the terms of an IFA than under the relevant modern award or enterprise instrument. In circumstances where the agreement was not genuinely agreed to or fails to meet the BOOT the employer continues to reap the benefits of having made an unlawful agreement for several months after the employee becomes aware they are being disadvantaged.

For these reasons the ACTU is strongly opposed to any extension to the notice period for unilateral termination.

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<sup>57</sup> See Modern Awards Review 2012 - Award Flexibility Decision, [2013] FWCFB 2170.

<sup>58</sup> [2013] FWCFB 2170, [171]

<sup>59</sup> Table 4.2

<sup>60</sup> [2013] FWCFB 2170, [175]

## **Genuine Needs Statement and Employer Defence**

The Bill modifies the flexibility term in both awards and agreements by inserting a requirement for a genuine needs statement.

A “genuine needs statement” is effectively a testimonial from the worker. It is a statement: “setting out why the employee believes (at the time of agreeing to the IFA) that the IFA:

- meets the genuine needs of the employee; and
- results in the employee being better off overall than the employee would have been if not IFA were agreed to”.<sup>61</sup>

The Bill mandates that the flexibility term of an award or an agreement must require that any IFA entered into includes a genuine needs statement.

The creation of a “genuine needs” statement works in tandem with a defence provision which will apply in relation to IFAs entered into in relation to awards and agreements. The defence provides that an employer does not contravene a flexibility term in relation to an IFA if, at the time when the IFA was made, the employer reasonably believed the requirements of the flexibility term were complied with.<sup>62</sup> The genuine needs statement is clearly a defence mechanism for an employer which ensures that an employer has no obligation to ensure that an employee entering into an IFA has given informed consent to this course of action. There is no protection offered to an employee through the genuine needs statement, rather the genuine needs statement has the opposite effect, denying an employee the ability to assert that they were not fully informed of what they were agreeing to.

The genuine needs statement fails to include any mechanism to quantify the entitlements an employee may be giving up and it does not include any safeguards which would ensure that an employee understands the monetary value of what they are trading off when they sign up to an IFA. The failure to include such provisions is akin to an employee signing a contract of employment where the consideration the employee gives is not identified or quantified in any way. It is unjust and unconscionable for an employer, a party in both a superior bargaining and industrial knowledge position to an employee, to be able to seek an employee’s agreement to something the effect of which the employee may not fully comprehend. Putting the onus on an employee to determine that they are genuinely better off is absurd.

Curiously, the Bill does not deal with situations where no genuine needs statement has been created. Any failure to obtain a genuine needs statement is not dealt with. Currently, if an IFA is defective, the IFA remains on foot (until withdrawn from) but the Act deems that the flexibility term has been contravened.<sup>63</sup> Prosecutions for breach of the flexibility clause can result in penalties

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<sup>61</sup> Fair Work Amendment Bill 2014, Item 14

<sup>62</sup> Fair Work Amendment Bill 2014, Item 204A

<sup>63</sup> s145(2)(3)

being awarded against the employer and compensation being paid to workers, where the IFA did not in fact result in the worker being “better off overall”.<sup>64</sup>

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.

The ACTU submits that these amendments are likely to completely undermine the protection afforded to employees by the BOOT and the requirement that an IFA be genuinely made.

Employees that are compelled, either through ignorance or undue pressure, to accept an IFA that reduces their terms and conditions of employment, will have no recourse under the law to recover payments lost as a result of entering into the IFA.

In other words, not only does the employer stand to benefit from an unfair IFA while it is in operation (including during the lengthy period of notice required for unilateral termination), but does so in perpetuity.

Moreover the fact that employers will be able to knowingly breach the provisions of the Act with impunity provides a significant financial incentive to exploit employees.

The requirement for a “genuine needs statement” was never identified in the Coalition policy and serves only to bolster an employer’s defence to a prosecution. Whilst the defence was identified in the Coalition policy by reference to a recommendation of the Panel, that recommendation stated that the defence should only be available where the employer had notified the Fair Work Ombudsman of the making of the IFA.

If the recommendation were implemented in full, employers would be much more cautious about seeking an IFA that undermines terms and conditions of employment. It is also more likely that the defence would only be used by employers that genuinely believe they had complied with the requirements contained in the Act.

### **The Better Off Overall Test**

In relation to the BOOT for IFAs, it is proposed to insert a Note providing that “Benefits other than an entitlement to a payment of money may be taken into account” for the purposes of that test.

The ACTU is strongly opposed to non-monetary entitlements being used to offset the BOOT. The BOOT is a fundamental safeguard that ensures employees have access to genuine flexibility without having to accept a reduction in wages and conditions.

The current legal authorities support the proposition that a purported IFA which contains a preferred hours arrangement (enabling an employee to trade off monetary benefits such as penalties and overtime in exchange for the flexibility to work their “preferred” hours) does not

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<sup>64</sup> See Part 4-1 of the Act

result in an individual employee being better off overall.<sup>65</sup> The proposed amendments are clearly intended to alter this position.

Unfair arrangements that have been the subject of successful prosecutions or out-of-court settlements under the existing provisions of the Act such as the substandard IFAs offered to Spotlight employees would become permissible.

Other examples of IFAs that are lawful under the proposed amendments include those that:

- enable employees to work from home in exchange for a reduced rate of pay;
- enable employees to vary their start and finish times if they agree to forgo overtime payments;
- enable employees to take annual leave in advance if they forgo their annual leave and shift loadings;
- provide employees with access to a car park or meal voucher in exchange for the suspension of applicable allowances; and
- provide part-time employees with a guaranteed number of hours per week in exchange for the suspension of minimum daily engagement provisions.

The ACTU notes that the safeguards identified in the Panel's recommendation that IFAs "be amended to expressly permit an individual flexibility agreement to confer a non-monetary benefit on an employee and exchange for a monetary benefit, provided that the value of the monetary entitlement forgone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate" have not been included in the proposed amendment.<sup>66</sup>

Consequently, there is no limitation on the monetary entitlements that an employee may be compelled to forgo in order to gain access to much needed flexibility. Employers that can easily accommodate a modest request for flexible working arrangements without incurring any additional costs will be able to use their superior bargaining position to insist on the removal of significant monetary entitlements under the terms of an IFA.

The Bill effectively empowers employers to offer employees hours which are available, rather than hours which an employee would prefer (with reduced or removed penalties). There is a chasm of difference between the hours and employee would prefer and those that an employer will make available to the employee.

### **Matters that may be subject to an IFA**

Finally, the Bill proposes that the flexibility term in agreements cover (at a minimum) arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading.

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<sup>65</sup> [2013] FWCFB 2170, [136]

<sup>66</sup> Recommendation 9, Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation.

The current legislation allows the content of flexibility terms in enterprise agreements to be narrower in scope than the model flexibility term. The EM states that this “means that employees covered by an enterprise agreement may be denied the opportunity for more suitable workplace arrangements even if their employer agrees”.<sup>67</sup>

This statement is misleading. There is nothing to prevent employers providing individual employees with access to additional flexibilities either through an informal arrangement or common law contract provided that the arrangement does not undermine the terms and conditions contained in the relevant enterprise agreement or modern award.

The key difference between these arrangements and IFAs is that the operation of the BOOT enables IFAs to include terms that are less beneficial provided that the employee is better off overall whereas common law contracts must not derogate in any respect from specific entitlements contained in a modern award or enterprise agreement.

Employees and unions engaged in bargaining commonly seek to restrict the matters that may be subject to an IFA, not because they wish to restrict individual flexibility, but in order to prevent employers targeting vulnerable employees and utilising IFAs to undermine collective conditions.

The effect of the proposed amendment is to restrict the capacity of parties to an agreement to freely negotiate the terms of that agreement and enable employers to systematically undercut beneficial provisions that were agreed to bargaining. The parties to an agreement have, through a process of bargaining and negotiation, agreed on an appropriate level of flexibility for the enterprise. In some cases this would mean that the flexibility clause is narrow in scope. This is entirely appropriate and the parties’ ability to reach a mutual agreement on the scope of the flexibility clause should not be curtailed through the changes proposed in the Bill.

## **Part 5 – Greenfields agreements**

The Bill proposes a series of amendments to greenfields agreement negotiations to take effect from the day after the Bill receives Royal Assent, and which apply to bargaining after that date.

The Bill would see a return to the bizarre situation which existed under WorkChoices where an employer could reach “agreement” with themselves about the terms and conditions of employment to be afforded to future employees. The Coalition’s proposal damages the very framework upon which bargaining is conducted in order to appease the concerns of a few employers in the oil, gas and construction industries. The Act applies nationally and it is nonsensical that these proposals should be implemented to placate a tiny minority of employers.

The Panel made four recommendations in relation to greenfields agreements. The first, Recommendation 27, was that good faith bargaining requirements apply to the negotiation of

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<sup>67</sup> Explanatory Memorandum, p xxix

greenfields agreements.<sup>68</sup> The second, Recommendation 28, was that employers intending to negotiate a greenfields agreement take all reasonable steps to notify all unions with eligibility to represent relevant employees.<sup>69</sup> The third, Recommendation 29, was that s 240 of the Act should be available to be utilised to resolve disputes over greenfields agreement negotiations.<sup>70</sup> The fourth, Recommendation 30, was that when an impasse in negotiations is reached, a specified time period has elapsed, and conciliation by the Commission has failed, the Commission may conduct ‘last offer’ arbitration upon application by a party or on its own motion.<sup>71</sup>

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.<sup>72</sup> 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,<sup>73</sup> relied upon in the EM is speculative and anecdotal.

The EM provides that organisations making greenfields agreements tend to be large, often multinational or joint venture operations.<sup>74</sup> We submit that these large businesses are the best equipped, or at least should be the best equipped, to handle agreement negotiations. They are the kinds of businesses which are most likely to employ a number of experienced human resources personnel who have the necessary skills to competently engage in bargaining. Further, the ancillary costs associated with negotiating greenfields agreements, such as travel and accommodation,<sup>75</sup> should be factored into any commercial venture as part and parcel of doing business, and are most likely to have the least impact on the types of businesses negotiating greenfields agreements.

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.

Taken together, the amendments set out in the Bill provide that:

- the good faith bargaining requirements apply to single enterprise greenfields negotiations;
- the bargaining representatives for such agreements are the employer, a person appointed by an employer and an organisation(s) that the employer agrees to bargain with (provided that/those organisation/s are entitled to represent one more persons who will be covered by the agreement);
- an employer may unilaterally give notice of a “notified negotiation period” of 3 months, the consequence of which is:

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<sup>68</sup> Report of the Fair Work Act Review Panel, “Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation”, 2012, p 172

<sup>69</sup> Ibid., p 172

<sup>70</sup> Ibid., p 172

<sup>71</sup> Ibid., p 173

<sup>72</sup> Explanatory Memorandum, p xiv

<sup>73</sup> Explanatory Memorandum, p xii

<sup>74</sup> Explanatory Memorandum, p xvii

<sup>75</sup> Explanatory Memorandum, p ix



- at the end of the period, the employer can apply to the Commission for the approval of the agreement, without the agreement of the other bargaining representatives;
- the agreement will be deemed to have been made with the organisations who were bargaining, and it will cover and apply to them irrespective of their wishes;
- the agreement will be subject to the usual approval tests applicable to greenfields agreements (including the majority representation test);
- the agreement will be subject to an additional test, namely that the Commission must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with prevailing pay and conditions within the relevant industry for equivalent work; and
- even if the agreement is not approved by the Commission, at the end of the 3 month period all rights to rely on or enforce the good faith bargaining requirements, or seek resolution of bargaining disputes, irrevocably terminate and any good faith bargaining orders that were made also terminate.

It is important to remember that the existing path of greenfields negotiations will also remain, save that the good faith bargaining requirements apply.

Proposed new s 177 provides that an organisation(s) that the employer agrees to bargain with (provided that/those organisation/s are entitled to represent one more persons who will be covered by the agreement) (a union/s) will only be a bargaining representative for a greenfields agreement where the union is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, and the employer must agree to bargain for the agreement with the union(s).

The Bill introduces the ability for an employer to veto a union's legitimate entitlement to bargain for employees it would represent in the future and to choose which union(s) it will bargain with. Failure to agree to bargain with a union(s) under new s 177(b)(ii) prevents that union(s) from participating in the making of the agreement. There is no mechanism available for a union to compel agreement to bargain from the employer.

The existing good faith bargaining requirements do not provide any effective mechanisms to compel an employer to agree to commence bargaining that would operate in a greenfields situation. The ability to seek a majority support determination is not available, nor can a union with no currently engaged members take industrial action against an employer to compel agreement to bargain.

Proposed new s 178B allows an employer to decide that it will effectively commence a 3 month bargaining period in relation to the proposed greenfields agreement, this is termed the "notified negotiation period". The employer may give an employee bargaining representative notice of this if it chooses. We note that this notice is optional as indicated by the word "may" in s 178B(1).

Issues concerning the giving of notice of a "notified negotiation period" will be unable to be addressed via a bargaining order.

The Bill does not provide for what happens in circumstances where this notice is not given. The proposed additions to s 255(1) provide that the Commission cannot make an order that requires, or has the effect of requiring an employer to give a notice or to agree to give a notice under proposed s 178B. Further, the Commission cannot make an order that requires or has the effect of requiring an employer to specify a particular day upon which the bargaining period, or notified negotiation period commences. The terms of s 182, which are discussed below, are only activated where the notified negotiation period has ended.

Effectively the employer is given the unilateral right to elect to go down the compulsory arbitration path. If, and only if, the employer does so, the agreement is subject to the new “market rates” test at approval time. This is a significant deviation from Recommendation 30. Recommendation 30 required a number of steps to occur prior to the Commission conducting arbitration of a greenfields agreement. The first step was that an impasse must be reached during the negotiations, the second was that a specified time period must have elapsed, the third is that the Commission must have attempted to conciliate the matter. Only after these three steps have occurred can the Commission arbitrate the matter. Further, Recommendation 30 suggested that arbitration could be conducted by the Commission of its own motion, or upon application by one of the parties to the negotiations.

What we see in proposed new s 182 is the ability for an employer to simply take an agreement to the Commission for approval upon the expiry of a 3 month time period. The only requirement is for the employer to give the union(s) an opportunity to sign the agreement. There is little to no incentive to sign an inferior agreement, and there is no ability for a union(s) to contest the employer’s course of action. There is no requirement to reach an impasse and no attempted conciliation or arbitration. The process is left entirely in the hands of the employer.

When an employer makes an application for a greenfields agreement to be approved it must also provide any declarations that are required by the procedural rules. This requirement is introduced by new s 185A. What these declarations look like, and what content will be contained in them, is unknown. We submit that the content of these declarations should include information which will allow the Commission to determine whether or not the greenfields agreement should be approved. This is particularly important as the union is not involved in the approval process. However, we are concerned, that as the requirement to the content is left to the procedural rules, there will not be adequate checks and balances put in place. While the application of the good faith bargaining requirements and the 3 month period were raised in the Coalition Policy,<sup>76</sup> it was never suggested that unions could be bound to agreements they did not make, nor was it suggested that the good faith bargaining requirements would cease to be applicable if no agreement was made.

The fact that proposed s 255A provides that the good faith bargaining obligations cease to apply at the expiration of 3 months provides an added incentive for employers to delay negotiations so that they continue on beyond 3 months. Once this period of time has elapsed not only can the employer apply to have the agreement approved, there is no mechanism available to the union to compel the continuation of bargaining in good faith. As noted, under proposed new s 255A(1)(e) upon the expiration of the 3 month period, any bargaining orders which were in operation cease to have effect.

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<sup>76</sup> The Coalition’s Policy to Improve the Fair Work Laws, May 2013, p 29

While it is proposed that a union will be covered by a greenfields agreement pursuant to s 201(2), there is no ability for a union to decline to be covered by a greenfields agreement let alone resist the approval of a greenfields agreement. It is a bizarre outcome that a union which may not agree with the content of a greenfields agreement should be bound to it against its will.

In relation to the market rates test proposed in new s 187(6) we are gravely concerned that it will result in a lowering for the prevailing industrial standards in the relevant industry. Over time the rates applicable in industries in which greenfields agreements are prevalent are likely to be reduced. The ability of unions to effectively bargain for fair and relevant wages for employees who will be employed to work on projects in the future will be significantly reduced if the Bill is implemented in its current form.

The proposed test in s 187(6) is a unique one.<sup>77</sup> There is no direct parallel in Federal industrial law. Further, only a very limited number of employers in certain industries and in specific circumstances will be able to access it. There is no corresponding provision for employees who are unable to reach agreement with their employer.

## Part 6 – Transfer of business

The Bill proposes an exclusion for what constitutes a transfer of business, in relation to national system employers and in relation to the expanded operation with respect to State Public Sector employers.

The exclusion would apply where both of the following apply:

- the new employer is an associated entity of the old employer when the employee becomes employed by the new employer; and
- before the termination of the employee's employment with the old employer, the employee sought to become employed by the new employer at the employee's initiative.

This is a response to the Panel's Recommendation 38<sup>78</sup> that the Coalition committed to implement.<sup>79</sup> It should be noted that the only employer to raise specific concerns to the Review in relation to this aspect of the transfer of business provisions was Qantas.<sup>80</sup> On the face of this proposal it appears that it is designed to allow Qantas to restructure its operations so that employees are forced into jobs which offer lower wages and conditions. As with the greenfields agreement proposals, this is another example of the Bill catering to the narrow grievances and interests of particular employers.

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<sup>77</sup> We note that arbitral functions with some parallels to this test were previously a feature of some State jurisdictions.

<sup>78</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 206.

<sup>79</sup> The Coalition's Policy to Improve the Fair Work Laws, May 2013, p 37

<sup>80</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, pp 205-207.

The amendment would take effect from the day after Royal Assent, in relation to employees commencing employment with a “new employer” after that date.

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.

In some cases it may be true that an employee chooses to transfer their employment to a related entity of their current employer. In *Sunstate Airlines (Qld) Pty Ltd*<sup>81</sup> weight was given to the fact that the employee applied for the new position on his own initiative and on the basis that the advertised terms and conditions of employment were acceptable to him. In such cases, where no duress has been applied to the employee because they have sought the new employment of their own volition, the result may be appropriate – and indeed that result was facilitated by the existing transfer of business provisions.

However, we submit that in many cases an employee will have no choice but to move to an associated entity of their current employer, for example when they are faced with the prospect of not having a job, as set out above, or for example when their current employer exerts some duress or coerces the employee to seek the transfer.

The employment relationship is inherently unbalanced. An employer, or a potential employer, holds a position of power over an employee. This means that it is essential to ensure that the power imbalance does not work to disadvantage employees. The means by which the power imbalance is kept in check is Part 2-8 of the Act.

The risk to employees is too great to justify the removal of the current protections found in the Act. The requirement to make an application under s 318 is not so administratively onerous as to justify the removal of the existing protections. An application under s 318 can be made by the transferring employee, or the new employer, or a union.

It is vital that the views of the transferring employee are taken into account.<sup>82</sup> A determination of whether an employee has sought a transfer of their own free will should be determined by the Commission, as is currently the case. It should not be determined based on paperwork completed by the parties, or an assertion made by an employer. It is necessary to examine the extent to which an employee has exercised their own choice free of any influence on the part of their employer or new employer.

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<sup>81</sup> [2011] FWA 4905

<sup>82</sup> S 318(3)(a)(ii)

## Part 7 – Right to strike subject to majority support or employer agreement

As foreshadowed in the Coalition policy,<sup>83</sup> the *JJ Richards* decisions<sup>84</sup> and the legal position since the inception of protected industrial action is to be turned on its head. The *JJ Richards* litigation has been consistently and deliberately misrepresented. It arose because the employer refused to engage in bargaining, not because of the union's failure to genuinely try to reach agreement (or refusal to "talk").

The possibility of industrial action of the type featured in the litigation has been an established feature of the Australian industrial relations landscape since the introduction of protected industrial action and the formal enterprise bargaining regime more than 20 years ago. It is a reflection of established case law. The Bill seeks to implement a de facto union recognition system and a structural incentive for an employer not to bargain.

Should the Bill be passed there will be no right to apply for a protected action ballot order unless and until one of the following things (**prerequisites**) has occurred:

- the employer agrees to bargain, or initiates bargaining, for the agreement (effectively an employer veto right); or
- a majority support determination in relation to the agreement comes into operation (effectively a union recognition system);
- a scope order in relation to the agreement comes into operation (which is contingent on an employer veto right) ; or
- a low-paid authorisation in relation to the agreement that specifies the employer comes into operation (an arbitration of the merits of bargaining).

The amendment would take effect from the day after Royal Assent, and apply to applications for protected ballot orders made after that date.

The amendment somewhat reflects the Review Panel's Recommendation 31.<sup>85</sup> The Bill introduces the requirement for a scope order or a low-paid authorisation to the Panel's recommendation that bargaining must have commenced or a majority support determination must have been obtained prior to an application for a protected action ballot being made. The Panel also recommended that the Act be expressly amended to provide that bargaining has commenced for the purposes of

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<sup>83</sup> The Coalition's Policy to Improve the Fair Work Laws, May 2013, p 37

<sup>84</sup> *TWU v JJ Richards & Sons Pty Ltd* [2011] FWA 973; *JJ Richards & Sons Pty Ltd v TWU* [2010] FWAFB 9963; *JJ Richards & Sons Pty Ltd v TWU* [2011] FWAFB 3377; *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53

<sup>85</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 177

making a protected action ballot application despite any disagreement over the scope of the agreement.

The key aspect of bargaining under the Act is the obligation that it must be done according to the good faith bargaining requirements. These principles, set out in s 228 of the Act, set the parameters for negotiations. The key aspect in relation to seeking a protected action ballot order<sup>86</sup> and the taking protected industrial action<sup>87</sup> under the Act is the requirement that the Commission must be satisfied that the applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted or who are to take protected industrial action. While the good faith bargaining requirements are not identical to the requirement to be genuinely trying to reach agreement, they are relatively similar. It has been held by the Federal Court that the express inclusion of the phrase “good faith” serves to reinforce the need for those who approach the bargaining process to do so in a genuine or “good faith” manner.<sup>88</sup> It can be implied from this that there must be some genuine intention to reach an agreement. As Justice Flick said “[I]t is clear from that phrase that the legislative purpose is to impose upon a party, not merely a requirement to “bargain” in “good faith”, but a requirement to bargain to achieve an objective, if possible, namely an “enterprise agreement”.”<sup>89</sup>

Essentially, the requirement to bargain in good faith and the requirement to be genuinely trying to reach agreement set a high bar in relation to the bargaining process, obtaining a protected action ballot order, and taking protected action. The requirement to be genuinely trying to reach agreement has been part of the industrial relations system for over 20 years. It is an established and familiar concept. As such, there is no reason to insert a prerequisite requirement on top of this well understood threshold test. Furthermore, the fact that the requirement is to be retained but supplemented by extraneous requirements gives voice to the policy position underlying the amendment: Workers and unions who are genuinely trying to reach agreement with their employer should not be permitted to take protected industrial action. It also sends a clear message to employers – “just say no”.

It should be noted that the ability to take strike action to compel and employer to bargain was available under WorkChoices<sup>90</sup> and its predecessors;<sup>91</sup> this is not a new phenomenon. It is therefore disingenuous of the Coalition to characterise the current provisions of the Act as containing a loophole.<sup>92</sup> The Panel noted that it was unclear, yet unlikely that the Act intended to remove this fundamental right.<sup>93</sup>

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<sup>86</sup> S 443(1)(b)

<sup>87</sup> S 413(3)

<sup>88</sup> *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764 at 41

<sup>89</sup> *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764 at 45

<sup>90</sup> S 444

<sup>91</sup> Workplace Relations Act 1996 (Cth) s 170MP; Industrial Relations Act 1988 (Cth) 170PI

<sup>92</sup> The Coalition’s Policy to Improve the Fair Work Laws, May 2013, p 37

<sup>93</sup> Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation, p 175

Since the *JJ Richards* litigation there has been no “outbreak” of the style or type of industrial action used therein. The imprimatur of the Full Federal Court referred to by the Panel<sup>94</sup> has not led to an increase in this kind of industrial action.

Further to our submissions above, simply because one of the prerequisites has been met, does not make it any easier for a union to prove that it is and has been genuinely trying to reach agreement. The obligation to prove a genuine attempt to reach agreement is still required prior to obtaining a protected action ballot or for industrial action to be protected.

Removing the ability of workers to take strike action until one of the prerequisites has been met is a restriction on the rights of workers to take strike action under international law.<sup>95</sup> As noted, it also reverses the ultimate outcome in the *JJ Richards* litigation which represents the status quo. The fundamental right of employees to compel their employer to commence bargaining through the mechanism of protected industrial action should not, as a matter of course, be subject to any additional fetters or prerequisites.

Further, the provisions in the Act dealing with protected action ballots are facilitative in nature.<sup>96</sup> They give rights to employees and the Bill proposes to do serious damage to these fundamental rights.

## Part 8 - Right of Entry

The amendments proposed in Part 8 of the Bill are derived from right of entry provisions which existed under WorkChoices and repeal recent amendments to the legislative framework that ensure union officials with entry permits are able to access workplaces to hold discussions with employees.

The objects of Part 3-4 of the Act as they currently indicate an intention to balance between competing considerations.<sup>97</sup> The existing provisions in the Act achieve that balance. The Bill proposes to disturb that balance, and will unfairly restrict the access of workers to their unions at work. Aspects of the proposed Bill remove any utility and efficacy the right of entry system may have in facilitating representation at work.

WorkChoices significantly restricted the rights of employees to be represented in the workplace by limiting the circumstances in which right of entry could be exercised. As the Panel notes there were two main problems that the Act sought to address:

First was the requirement that to exercise a right of entry for discussion purposes, a union was required to be bound by an applicable industrial instrument. This had the effect of preventing union members and eligible employees in a workplace from being represented by their union.

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<sup>94</sup> Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation, p 176

<sup>95</sup> See the Freedom of Association and Protection of the Right to Organise Convention 1948 and the Right to Organise and Collective Bargaining Convention 1949.

<sup>96</sup> See Division 8 of Part 3-3 of the Act

<sup>97</sup> See also ss 3(e) and 6(5) of the Act

Second, allowing an employer to determine the location at the workplace where union members and employees eligible to be a member of a union could meet their union representatives, unless the location was unreasonable, lead to employees being required to meet their representatives in inappropriate locations, such as a toilet block.<sup>98</sup>

The amendments to the right of entry scheme guarantee that such problems will re-emerge.

### **New Conditions of Entry for discussion purposes**

The Bill provides new eligibility criteria that determine when a permit holder may enter premises for the purpose of holding discussions or conducting interviews with employees.

The new conditions of entry for discussion purposes are:

- where an enterprise agreement applies to work performed on the premises, and the permit holder's organisation is covered by that agreement;
- where an enterprise agreement applies to work performed on the premises, but it does not cover the permit holder's organisation, but only if a member or prospective member has invited the union; and
- where no enterprise agreement applies to work performed on the premises, but only if a member or prospective member has invited the union.<sup>99</sup>

The current provisions of the Act enable a union official to enter a workplace to hold discussions with employees who perform work on the premise, whose industrial interests the permit holder is entitled to represent and who wish to participate in those discussions.<sup>100</sup>

The key difference between the existing provisions and the right of entry scheme that operated under WorkChoices is that entry rights are tied to whether the relevant union is entitled under their eligibility rules to represent employees at the workplace. In practice, the Act requires employers who were previously able to exclude many, or all, unions from their workplace on the basis of applicable industrial instruments, to facilitate a relevant union accessing the employees at the workplace.

The provisions contained in the Bill concerning right of entry are similar to WorkChoices. The effect of these amendments is that unless the union is already covered by an enterprise agreement that applies to work performed on the premises, employees will be required to take positive steps to enable the union to attend a workplace.

Contrary to the very clear commitment given by the Coalition, there is no explicit right of entry (conditional or otherwise) given where a union is a bargaining representative seeking in good faith to make an agreement to apply in that workplace.<sup>101</sup>

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<sup>98</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 189

<sup>99</sup> Item 61

<sup>100</sup> s484



There has been some attempt to ameliorate the very obvious difficulty of proving a member or prospective member has invited the union on site, which is the “Invitation Certificate” procedure. 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. Notably, no provision of the Bill actually requires that an employer or occupier take notice of an Invitation Certificate.

The new provisions clearly limit the capacity of vulnerable workers to access their union. Employees are unlikely to be aware of the legislative requirements concerning right of entry and may not know which union is eligible to represent their interests. Fear of retribution from their employer will also deter many employees from issuing an invitation to the relevant union. While the amendments require that an invitation certificate must not reveal the identity of the member or prospective member to whom it relates, it is likely that employees will be intimidated by the prospect of having to go through a formal process in order to invite a union onto the workplace. Employers that wish to do so will be able to limit the capacity of employees to access the union by simply ignoring the existence of an Invitation Certificate.

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<sup>101</sup> The Coalition’s Policy to Improve the Fair Work Laws, May 2013, p 17

## **New Dispute Resolution Provisions**

The Bill amends s 505A of the Act which enables the Commission to deal with a dispute concerning the frequency of entry by a permit holder to a workplace under s 484 for the purpose of hold discussions with employees.

The amendment to s 505A(4) replaces the current threshold question that prevents the Commission from making an order in respect of frequent entry unless the Commission "...is satisfied that the frequency of entry by the permit holder or permit holders of the organisation would require an unreasonable diversion of the occupier's critical resources" with a new provision that will require the Commission to consider the combined impact on "operations" of entries by any organisations, including those who are not party to the dispute.

The existing provisions were implemented in response to a recommendation of the Panel that the Act "be amended to provide FWA with great power to resolve disputes about the frequency of visits to a workplace by a permit holder in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience."<sup>102</sup>

The ACTU did not support the implementation of these provisions. In our submissions to the House Standing Committee on Education and Employment concerning the Fair Work Amendment Bill 2013, we respectfully disagreed with the Panel that any additional amendments to the Act were necessary in order for the Commission to adequately deal with disputes concerning excessive entries. We also argued that to the extent that there was any evidence of entry rights being exercised "too frequently" this was in large measure a function of the protocols adopted by employers, occupiers and project managers on large worksites. Such protocols effectively required the permit holders to treat a worksite as comprising a multitude of premises (depending on their physical location on the site and which contractor or sub-contract was engaged there) and make separate entries (sometimes more than one on the same day) in order to exercise their rights under the Act.

Whilst maintaining that specific provisions concerning too frequent entry are unwarranted, we submit that the s 505A provides an adequate mechanism of dealing with excessive visits to a particular workplace, should this occur. The ACTU is not aware of any cases under the existing provisions and in our submission, there is simply no evidence to suggest that further amendments are required to address employer concerns.

We note that the Act contains a number other mechanisms that that could be used to address the issue of excessive visits, should the need arise. These include the broad powers of the Commission to take action against a permit holder (by suspending, revoking or impose conditions on an entry permit) or make any order it considers appropriate to restrict entry rights if satisfied that the official or organisation has misused those rights.<sup>103</sup>

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<sup>102</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, Recommendation 35, p 195.

<sup>103</sup> s507, s508

Permit holders are not necessarily in a position to know about or regulate the conduct of other permit holders.

The effect of the proposed amendments requiring the Commission to consider the combined impact of entries by any organisations, including those who are not party to the dispute is that all unions will be locked out of a site if one union is found to have entered too frequently.

It is also possible that access to a worksite may be restricted in circumstances where the total number of visits may be regarded as excessive from the employer's point of view even though the number of visits conducted by each permit holder is entirely reasonable and may be necessary in order to ensure that employees have access to a union that is entitled to represent their interests.

### **Location of interviews and discussions**

The Bill repeals recent amendments concerning the location of interview or discussions which occur pursuant to the rights contained in Division 2 of Part 3-5. Under the WR Act prior to WorkChoices the effective default position was that a union had the right to hold discussions with employees where employees congregated on their breaks (most usually where they take their meals).<sup>104</sup> The 2012 amendments to the Act reflect the long standing and largely uncontentious position under the previous legislation.

The rights affected include the right to hold discussions with employees during meal times or other breaks (Subdivision B) and the right to conduct interviews at any time during working hours pursuant to a right to investigate a suspected contravention (Subdivision A and AA).

S 492 of the Act currently requires a permit holder to conduct discussions in the rooms or areas agreed with the occupier of the premises.<sup>105</sup> If the permit holder and the occupier are unable to agree, the permit holder is entitled to hold discussions in any room or areas in which employees ordinarily take meals or other breaks and is provided by the occupier for that purpose.<sup>106</sup> S 492A requires the permit holder to comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area.

These provisions were inserted into the Act by the *Fair Work Amendment Act 2013* to ensure that permit holders are able to meet with union members and eligible employees in the most convenient location. The main meal or break room is generally the most accessible and practical location for permit holders to meet with employees.

The Bill repeals the current provisions and substitutes s 492 as it existed prior to the 2013 amendments. Under these provisions employers routinely frustrated opportunities for workers to meet with their union. In our submission to the Panel, we provided a number of examples of employer conduct designed to prevent workers having access to their union. These include:

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<sup>104</sup> S 285C Workplace Relations Act 1996. See cases such as *Textile Clothing and Footwear Union of Australia v Leading Synthetics - 588/99 M Print R5518* [1999] AIRC 616 (3 June 1999) and *Construction, Forestry, Mining & Energy Union and another and McConnell Dowell Constructors (Aust) Pty Ltd 1366/97 M Print P6606* [1997] AIRC 1107 (11 November 1997). See also Orders such as *077/96 M Print N0607* [1997] AIRC 1062 (3 November 1997)

<sup>105</sup> s492(1)

<sup>106</sup> s492(2)(3)

- preventing the announcement of the arrival of the union official (or the employer's refusal to make such an announcement);
- directing the official to meet workers at some far-off place (which cannot be reached during the lunch break);
- staggering breaks so that there is never a time that all workers are on a common lunch break;
- directing the official to meet with workers in a room next to the manager's office, so that the employer can observe who attends; and
- directing the official to meet with workers in a room that has insufficient space in order to limit the number of employees that can attend.

The Panel accepted that the capacity for Commission to deal with the 'merits' of a dispute over the reasonableness of a meeting location was constrained by the provisions (as they existed prior to *Fair Work Amendment Act 2013*) which gave primacy to the right of the occupier to select the location of a meeting.<sup>107</sup>

The Panel recommended that the relevant provisions be 'amended to provide the Commission with greater power to resolve disputes about the location for interviews and discussions in a way that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience'.<sup>108</sup>

The amendments contained in the Bill are inconsistent with the Panel's recommendation, will enable employers to reinstitute practices that make it difficult for permit holders to access an appropriate location for discussion purposes and effectively deny workers the opportunity to meet with their union.

### **Transport and Accommodation Requirements**

In addition the Bill repeals amendments made by the *Fair Work Amendment Act 2013* that introduced new provisions concerning transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations.

In many locations transport and/or accommodation is only accessible if the occupier of the premises supplies it (on whatever terms it chooses). This is particularly an issue in the resources sector where "fly in fly out" workers are engaged.

The Act currently requires the occupier to supply the permit holder or his or her occupation with the necessary transport and/or accommodation in particular circumstances on a cost recovery basis.<sup>109</sup>

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<sup>107</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, p 197.

<sup>108</sup> Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation", 2012, Recommendation 36, p 197

<sup>109</sup> s521C, s521D

There are a number of conditions that must be satisfied before the obligation to provide accommodation arises:

- the premises to which the entry is sought is located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises causes it to be provided;
- to provide accommodation would not cause the occupier undue inconvenience;
- the request is made within a reasonable period before accommodation is required; and
- the permit holder and the organisation of which the permit holder is an official have been unable to enter into an accommodation arrangement with the occupier by consent.<sup>110</sup>

Similar conditions apply to the obligation to provide transport.<sup>111</sup>

The occupier is entitled to charge the permit holder a fee provided that the fee is no more than what is necessary to cover the cost to the occupier of providing such accommodation/transport.<sup>112</sup>

These provisions enable employees at remote locations to have access to their union at the workplace, ensure permit holders behave in an appropriate manner and provide reasonable limits on the recovery of costs associated with the provision of transport and accommodation.

Removing the obligation on employers to facilitate accommodation and transport for permit holders will significantly disadvantage employees at remote locations by making it virtually impossible for them to participate in discussions with their union at work. The only circumstance in which such employees will be able to do so is where the employer voluntarily elects to facilitate the permit holder's entry rights.

## Part 9 – FWC hearings and conferences

The Bill implements several recommendations contained in the F Panel's report that relate to the capacity of Commission to dismiss unfair dismissal applications.

Currently the Commission is required by s 397 of the Act to hold either a conference or a hearing in an unfair dismissal matter where there is a factual dispute.

The effect of the proposed amendment would be to create an exception to s 397 for factual disputes over the grounds for summary dismissal of an application. This means if there is a factual dispute about whether:

- the application is not made in accordance with the Act;

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<sup>110</sup> s521C(1)(2)

<sup>111</sup> s521D(1)(2)

<sup>112</sup> s521C(3), s521D(3)

- the application is frivolous or vexatious;
- the application has no reasonable prospects of success;
- the applicant unreasonably failed to attend a conference or hearing;
- the applicant unreasonably failed to comply with an order or direction; or
- the applicant unreasonably failed to discontinue the application after a settlement agreement had been reached

The Commission will be permitted to dismiss the application without holding a hearing or conference, provided that the Commission has invited the parties to provide information about whether the power should be exercised.

The summary dismissal powers in unfair dismissal matters exist to benefit employers. These amendments will facilitate such matters being determined on the papers.

During oral hearings and conferences, Tribunals generally try to ensure that unrepresented parties understand what is occurring. 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.

## Part 10 – Unclaimed money

The Bill responds to a recommendation of the Panel that the coalition committed to implementing.

The Act currently provides for certain debts owed to employees by employers to be paid to the Commonwealth if the employee has left their employment and cannot be located. The Act also provides for those monies to be claimed by the employee from the Commonwealth.

The amendment would facilitate (but not *require*) the Commonwealth remitting interest to the employee on those funds when they are claimed.

The ACTU supports this amendment however we believe the amendment would be improved by matching the pre-election commitment that: “The Coalition will require that the interest earned on money which has been recovered by the Workplace Ombudsman for underpaid workers, be given to those workers who have been underpaid”<sup>113</sup> (emphasis added)

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<sup>113</sup> The Coalition’s Policy to Improve the Fair Work Laws, May 2013, p 31



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