

Senate Education and Employment References Committee

Questions on Notice – Friday 26 June

Sydney, NSW

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Question number	Hansard page number	Witness	Question asked by	Answered
1	2	ACTU	Chair	Yes
2	5	ACTU	Senator McKenzie	Yes
3	6	ACTU	Chair	Yes
4	9	ACTU	O'Neill	Yes
5	10	ACTU	Senator McKenzie	Yes
1	15	AMIEU	Senator McKenzie	Yes
1	37	National Farmers Federation	Senator O'Neill	Yes
2	38	National Farmers Federation	Senator O'Neill	Yes

Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Sydney, NSW

Questions taken on notice –ACTU

1. HANSARD, PAGE 2

CHAIR: It would be good to hear from the two workers. Ms Kearney, since your submission the northern Australia white paper has been published which goes to uncapping and expanding the seasonal worker program. Rather than take time off the committee today, could you take that on notice and if there is a really further comments you would like to make in relation to that that would be appreciated.

Ms Kearney: Certainly, we will get that to you.

ACTU Response

The ACTU has addressed this same issue in our submission to the inquiry currently underway into the seasonal workers program by the Joint Standing Committee on Migration

(http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Seasonal_Worker_Programme). Below, we provide the relevant excerpt from that submission for the information of the committee.

Expanding the Seasonal Workers Program to other countries and sectors

The Australian Government has already announced measures to expand the Seasonal Workers Program as part of its recent White Paper on Northern Australia. There are a number of elements to this.

Under the White Paper proposals, there will no longer be a limit to the number of workers from Pacific Island countries participating in the program. Existing caps will be removed. The White Paper also proposed the expansion of the program to cover the broader agriculture sector and the accommodation sector on an ongoing ('non-trial') basis. The tourism industry is invited to suggest proposals to trial the program in tourism sectors other than accommodation. Additional countries, including the Cook Islands, Federated States of Micronesia, Niue, Palau and the Republic of the Marshall Islands, may be invited to participate in the program subject to the conclusion of the PACER PLUS regional trade agreement. Finally, the White Paper proposes the establishment of a special multi-year visa to 250 citizens from Kiribati, Nauru and Tuvalu to work in lower skilled occupations.

It appears from the Australian Government, Department of Employment Website that these proposed measures, including the uncapping of places, took immediate effect on 18 June 2015 with the release of the White Paper.¹

In our submission, the proposals to expand the program were premature and should have been subject to further scrutiny and consultation. Unions have not been consulted on these proposals. The White Paper makes no attempt to consider any of the risks of exploitation involved in increasing the number of potentially vulnerable low-skilled workers, many of whom may have limited English and knowledge of Australian labour laws and social norms, being tied to a single employer and location. There is no discussion in the White Paper of the wages and conditions for these workers, how those conditions will be monitored and enforced, and the support mechanisms that will be in place to assist the workers.

While the seasonal workers program may not have been beset with problems of exploitation to the same extent as other temporary visa types under examination by the current Senate Inquiry, unions nonetheless continue to report cases of underpayments and other problems arising under it. Further information on these cases can be provided to the Inquiry on request. Research into the program has reported other problems with poor accommodation, pay deductions, different employment contracts applying and minimum hours requirements not being met.²

There also needs to be greater consideration given to the risks involved in the continued use of labour hire companies and other intermediaries and what this means for exploitation if the Government opens the program up further. An Australian Institute of Criminology report finds that there is an increased risk of labour exploitation in those cases where an intermediary/labour hire companies are used.³ Managing the increased risk when intermediaries such as local business organisations and recruiters in the specific countries covered by this scheme are involved is critical. We also note that expansion of the program is being pushed in sectors like hospitality that already have one of the highest rates of sponsor sanctions under the subclass 457 visa scheme.

This is all not to say the expansion of the program may not bring benefits in terms of development in the Pacific island countries. The small scale nature of the Australian program in terms of total numbers thus far has meant the benefits back to the respective home countries have not been distributed as widely as they would naturally under a larger scale program with more participants.⁴ There is also a view that expanding the participating countries could help spread opportunities where they are most needed in the Pacific, rather than being concentrated on relatively affluent Pacific countries such as

¹ <https://employment.gov.au/news/seasonal-worker-programme-expansion-question-and-answer-factsheet-now-available>

² Ball, R., Beacroft, L., & Lindley, J., "Australia's Pacific Seasonal Worker Pilot Scheme: Managing vulnerabilities to exploitation", Trends and Issues in crime and criminal justice no. 432, Australian Government Australian Institute of Criminology, November 2011

³ Ibid.

⁴ Gibson, J., McKenzie and Rohorua, H., Developmental impacts of seasonal and temporary migration: A review of evidence from the Pacific and South East Asia, Asia and the Pacific Policy Studies, Australian National University, 2013.

Tonga, which already enjoys better economic prospects and labour mobility opportunities.⁵

Provided it is properly structured and regulated, an expanded Seasonal Workers Program could have wider, ongoing benefits for workers and communities in Pacific Island countries. However, appropriate safeguards and oversight must accompany any future expansion, and be in place before that expansion takes place.

This includes ongoing review of existing pre-departure, on-arrival and post-return briefings to ensure they are meeting the needs of workers and their communities and setting them up for success both during their stay in Australia and their return to their home country. Among other things, this means ensuring that briefings are providing appropriate information and advice on labour conditions, rights and responsibilities at work, Australian social norms, OHS, mental health issues, financial literacy, and further skills and business development training on return to the home country. Relevant unions in both the home and host countries should have access to the workers and input into the briefings at each stage of the process, consistent with recommendations of the World Bank.⁶ Pastoral care responsibilities are another priority.

We also note that both the pilot and the ongoing program were conceived at a time of relatively low unemployment. Different considerations apply now at a time when national unemployment remains stubbornly above 6% and youth unemployment is more than double that. Youth unemployment in some regions is up to 20% or more. This suggests the need for some caution before expanding the program further. It also reinforces the need for labour market testing, rigorously applied and enforced, to remain as a cornerstone of the program to ensure that Australian workers are given first priority.

This is particularly important when one considers that seasonal workers under the program can take up work in occupations such as bar attendants, waiters, café workers, garden labourers, kitchen hands and cleaners – occupations that unemployed Australians could readily fill without the need for formal qualifications or long lead-in training times.

Unions support the development of tripartite industry plans for the sectors that are using the program to ensure ongoing employment and training opportunities for Australian citizens and permanent residents are maximised. Employers who use seasonal labour from Pacific Island countries should have obligations to be employing and training Australian workers at the same time.

⁵ <http://devpolicy.org/in-brief/world-bank-calls-on-australia-to-introduce-a-permanent-migration-scheme-for-pacific-islanders-20130616>

⁶ Alkema, A., Global Jobs Pact: Pacific Labour Governance and Migration, Literature Review: Seasonal Migration, 2011; World Bank (2006) At home and away: Expanding job opportunities for Pacific Islanders through labour mobility <http://siteresources.worldbank.org/INTPACIFICISLANDS/Resources/Executive-Summary-LABOUR-mOBILITY-rEPORT.PDF>

The decisions to expand the program and remove any caps also appear to overlook the fact that the current caps are not even being filled. This has been the case ever since the pilot program started. The evidence is that this is not a reflection of any supply-side problems. Workers in the relevant Pacific Island countries generally welcome and are keen to take up the opportunity to work under the Seasonal Workers Program.⁷ Rather, the issue is on the demand side with employers preferring to use other readily available sources of labour, in particular working holiday visa makers (but also in part reflecting the continued prevalence of illegal overseas workers without valid work rights).

This was the evidence from a recent World Bank report into the program which found the ready availability of backpacker labour was undermining demand for Pacific seasonal workers.⁸ There was also an issue that up to half of those employers surveyed did not know about the scheme. These findings echo earlier research into the issue from ANU researchers who found that 70% of employers indicated no need for the scheme and only 7% indicated any difficulty in finding workers, given the growing size of the 417 working holiday visa cohort in Australia.⁹ Both the World Bank and the ANU researchers have supported a scaling back of the working holiday visa program in response.

To give a sense of this issue, it is worth noting that in 2013-14, a total of 229 378 working holiday 417 visas were granted to young people from overseas (along with a further 10 214 subclass 462 Work and Holiday visas).

The total number of working holiday visa holders in Australia – 160 940 on the latest figures– is now equivalent to around 7.7% of the total Australian labour force aged 15-24. These figures have more than doubled since mid-2007 when working holiday visa holders numbered 74 450 and were 3.7% of the Australian workforce aged 15-24. There are over 50 000 more working holiday visas granted each year now than there were four years ago.¹⁰

Since mid-2010, the number of working holiday visas have increased from around 100 000 to 160 000. As a point of comparison, youth unemployment has gone from 11.6% to 13.7% in the same period.

In examining the working holiday visa, a very important feature to note is that visa holders are able to apply for a second year visa if they undertake 88 days specified work in a designated regional area during the course of the first year of their initial visa in industries such as agriculture, forestry and fishing. Incredibly, the policy from DIBP until very recently has been that this 88 days' work can be either paid or unpaid.

⁷ Gibson, J., McKenzie and Rohorua, H., Developmental impacts of seasonal and temporary migration: A review of evidence from the Pacific and South East Asia, Asia and the Pacific Policy Studies, Australian National University, 2013.

⁸ Bennett, J., "Backpackers, illegal labour crueling Seasonal Worker Program for islander countries: World Bank", ABC News online, 18 February 2015

⁹ Hay, D., and Howes, S., "Australia's Pacific Seasonal Worker Pilot Scheme: why has take-up been so low?", Australian National University, Development Policy Centre, Discussion Paper 17, April 2012.

¹⁰ Working Holiday Maker visa programme report, Department of Immigration and Border Protection, Australian Government, 30 June 2014, p. 17.

DIBP reports¹¹ show there were 45 950 second year visas granted in 2013-14, an 18.2% increase on the previous financial year. This means that around one in four Working Holiday visa holders are now being granted a second year visa. The vast majority (90%) are doing work in agriculture to acquire eligibility for the second year visa, with smaller numbers doing work in construction and mining.

The number of second working holiday visa grants has grown rapidly since the program commenced in late 2005. There were just 2 962 second year visa grants in 2005-06, compared with 45 950 grants in 2013-14. From 2010-11 to 2013-14 the number doubled. The second working holiday visa now constitutes 20% of the overall working holiday program by 30 June 2014. This compares with just a 3.3% share of overall working holiday visa holders in Australia as at 30 June 2006.

When employers have access to such a large labour supply with no requirement for labour market testing, it is not surprising perhaps that the seasonal workers program has been 'crowded out' and undersubscribed. As one Queensland citrus grower put it "It's very easy to employ a backpacker who shows up at your door...it's not such a commitment and it's sometimes very easy for farmers to go down that track".¹²

The availability of the second year working visa extension has created particular problems. Reports that unions receive are that employers are basing their whole business model around using the labour of working holiday makers, in some cases for free or by paying them well below Australian award standards. The recent Four Corners program shed further light on the extent of the exploitation. A scan through job sites such as *Gumtree* uncovers numerous examples of job advertisements directly targeted at overseas workers, enticing them with the lure of a second working holiday visa, with Australian workers not even being considered in some cases.¹³

To address these issues, the ACTU submission to the current Senate Inquiry into the Temporary Work Visa Program has recommended the following measures:

- The introduction of annual caps or quotas on the Working Holiday Visa Program taking into account the labour market conditions for young Australians;
- The second year working holiday visa extension be abolished;
- Remodel the work rights attached to the working holiday visa so that it operates as a genuine holiday visa, rather than a visa which in practice allows visa holders to work for the entire duration of their stay in Australia.

¹¹ Working Holiday Maker visa programme report, Australian Government, Department of Immigration and Border Protection, 30 June 2014, p. 17.

¹² Bennett, op. cit

¹³ See for example <http://au.indeed.com/m/viewjob?jk=ef4d6d979b9942b4&from=ja>

If the Government was serious about wanting to expand the seasonal workers program, measures such as these to bring the working holiday visa program under control would be part of the response. Instead the White Paper proposes to expand the working holiday visa program, as outlined below.

At present, working holiday makers (417 visa) can already work for the entire duration of their one year visa in Australia, but can only work six months with any one employer. They can also access a second year visa extension if they work for three months in agriculture, mining and construction during their first year visa. Problems with the second year visa extension are rife as employers exploit vulnerable backpackers desperate to extend their stay in Australia. As indicated above, the ACTU has called for the second year visa extension to be abandoned altogether.

The main changes to current working holiday arrangements in the White Paper are:

1. Working holiday makers can now work an additional six months with one employer in Northern Australia, if they are working in a range of 'high demand' industries including tourism, hospitality, disability and aged care, mining, and agriculture.
2. Access to the second year visa extension will now be extended to those who work for three months in the tourism sector in the north and it will be extended to those visa holders under the smaller Work and Holiday visa program (visa 462) in addition to the Working Holiday 417 visa.

The White Paper proposals actually put paid to the Government's continuing attempts to portray the working holiday program as simply a holiday visa with a bit of short-term incidental work here and there. As the paper states, 'this change means WHM visa program participants could potentially be able to work in Australia for the entire duration of their two year stay in Australia'.¹⁴

The proposed expansion of the working holiday visa program not only ignores the many problems of exploitation that have occurred under this visa, as documented in our submission and other evidence to the current Senate Inquiry, the recent 4 Corners expose, and the Fair Work Ombudsman report into the employment practices of Baiada and a multitude of associated labour hire contractors.¹⁵

It will also continue to undermine any attempts to expand the seasonal workers program. If there is a push to increase use of the Seasonal Worker Program, it is contradictory and counter-productive in our view to advocate simultaneously for expansion of the working holiday visa, given the evidence of what has caused low take up to this point.

¹⁴ Northern Australia White Paper, Australian Government, p. 112

¹⁵ <http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150618-baiada-group-statement-of-findings>

Finally, there is an argument for permanent migration options to be part of the response, rather than, or in addition to, simply looking to expand the existing temporary seasonal scheme. The World Bank, among others, has put the view that Australia should emulate New Zealand's Pacific Access Quota under its permanent migration intake.¹⁶ In essence, its argument is that permanent migration will deliver greater benefits for Pacific Islanders than temporary seasonal schemes with limited numbers.

Generally, the ACTU has a strong preference for permanent migration where people come to Australia independently, without the risks of exploitation that come from relying on temporary, employer-sponsored forms of migration. Permanent migration also helps place migrants on a more secure footing with a permanent stake in Australia's future.

The Seasonal Workers Program has largely avoided some of the more serious problems with exploitation that have afflicted other parts of the temporary work visa program, in large part because proper effort has gone into regulating it. The capacity to have return trips under the program – circular migration – also helps provide more lasting benefits than a one-off temporary stay. However, we believe there is merit in the idea of also providing better access to permanent migration, and further consideration should be given to this. This should include an assessment of the impact such permanent migration would have on the home countries from losing productive members of society who migrate permanently. This has been an issue even under the temporary schemes in Australia and New Zealand.¹⁷

¹⁶ <http://devpolicy.org/in-brief/world-bank-calls-on-australia-to-introduce-a-permanent-migration-scheme-for-pacific-islanders-20130616/>

¹⁷ Ball, R., Beacroft, L., & Lindley, J., "Australia's Pacific Seasonal Worker Pilot Scheme: Managing vulnerabilities to exploitation", Trends and Issues in crime and criminal justice no. 432, Australian Government Australian Institute of Criminology, November 2011

2. HANSARD, PAGE 5

Ms Kearney: Have any of these unions ever acted as sponsors for a 457 worker?

Ms Kearney: The SDA and the nurses? I really could not tell you.

Senator McKENZIE: Can you take that on notice?

Ms Kearney: Sure.

Senator McKENZIE: That is either presently or over the last five years.

Ms Kearney: Sure.

ACTU response

The SDA and the Australian Nursery and Midwifery Federation have not sponsored any 457 visa workers, either currently or over the past five years.

Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Sydney, NSW

Questions taken on notice –ACTU

HANSARD, PAGE 9

Senator O'NEILL: Can I just put three things on the record, because I know that we are going to go. Thank you very much for your testimony and for your work. You talked about verification of the job market. I wondered if you had seen the evidence from Brisbane about local labour markets that were consulted by the meatworkers to find out about job readiness—if that has ever been part of a plan for a way in which the market can be more thoroughly tested than just an ad placement. If you have put your mind to that or you have any evidence around that, it would be very helpful for the committee. You spoke about data gaps, particularly apprenticeships and the differentiation between them. I would like more information about where any of that is actually already being applied in the country and how it is working. Your comments around the labour hire companies—I would like a little more information about what you propose with the changes that you just articulated in your opening statement. Finally, on the language testing, I note your submission, page 79 to 81, and I would have loved to have talked more about that, because there are some pretty alarming things going on. When people cannot read, they are very subject to exploitation, but so are the people they serve, in hospitality even.

ACTU response

There are several discrete issues raised by Senator O'Neill. We address each of them in turn.

Labour market testing

The ACTU attended the Brisbane hearing on 12 June and we have since reviewed the relevant transcript of evidence referred to in Senator O'Neill's question. We take the opportunity here to pay tribute to the tireless efforts of the AMIEU organiser, Mr Ian McLauchlan, to help local unemployed people around the Stanthorpe-Tenterfield area find work in the meat industry. In the words of a worker from a local employment agency cited in the evidence, “ *Thank God someone is helping the locals. It takes the union to do it*” (*Hansard*, 12 June 2015, p. 16).

This evidence does indeed point to practical ways in which the current system of labour market testing can be strengthened to support employment opportunities for Australian workers, consistent with the proposals we have already advanced in our written submission.

The purpose of labour market testing is to ensure that before a 457 visa worker can be approved, there is evidence the employer has made all genuine efforts to find an Australian worker for the position and there is no Australian readily available to fill that position. In our view, evidence that the employer has advertised the position (s) appropriately is a basic, non-negotiable starting point to demonstrate the labour market has been tested. That is, there should be a clear, mandatory obligation on sponsors to have advertised the nominated position.

However, the placement of a job ad is not in itself sufficient to achieve the intention of labour market testing. From that starting point, other relevant sources of intelligence on local labour market conditions should then be utilised to supplement the requirement to advertise. As we stated in our written submission, the Department and Minister should have the ability to ask questions of prospective sponsors and delve deeper into their efforts to recruit locally, particularly in circumstances where employers are repeatedly claiming they cannot find local Australian workers. For instance, in practical terms, a situation where an employer has put an ad in the paper and simply indicates that no applications were received or no suitable Australian applicants were available should not of itself be sufficient to meet the labour market testing condition under the legislation. This would require further investigation to test the genuineness of those local recruitment efforts.

As the example from the AMIEU shows, this should include a requirement for the Department to consult with local unions, employment agencies, employer bodies and other community groups who are on the ground and best placed to verify the existence or otherwise of genuine skill shortages in a given area or region, and the availability of Australian citizens and permanent residents to take up job opportunities.

This requirement should be a formal part of the assessment process under the labour market testing provision. Embedding such a requirement into the labour market testing regime would bolster the rigour of the process, and by giving voice to local knowledge and expertise would help increase community confidence and support in the temporary work visa program.

There would be merit in establishing a network of tripartite regional employment authorities for this very purpose.

Labour hire licensing

The problems caused by unscrupulous labour hire companies have been well documented in submissions and evidence before this Inquiry and elsewhere.

In response, unions are calling for a legislated, national licensing scheme for the labour hire industry. This position has been endorsed by the recent ACTU Congress and is consistent with ILO Convention 181 that promotes the licensing and or certification of temporary agency to mitigate the risk of 'malpractice and abuse of clients'.

There are some fundamental pre-conditions for a rigorous labour licensing system.

Such a scheme must have real 'teeth'. It cannot simply be a business registration scheme that does little more than collect administrative information from the labour hire agency and is ineffective in promoting and protecting good employment conditions for workers.

It must have an explicit focus on creating effective barriers to entry to the labour hire industry that reduce or remove altogether the number of small and disreputable labor hire providers. At present, the lack of licensing or any other form of regulation means there are effectively no barriers to entry in the labour hire industry. This has created a host of problems in the sector that have manifested themselves in the types of practices seen on the 4 Corners program. The lack of effective and proper regulation of the labour hire sector often encourages undercutting behaviour and exploitation of vulnerable workers. Many labour hire agencies are insufficiently capitalised and are little more than 'a man with a van' and a mobile phone. They survive by undercutting those employers who do meet their obligations. Phoenixing of labour hire companies is a common problem.

A licensing system would also be expected to result in penalties being imposed and licenses being suspended or cancelled when licensing conditions are breached. The scheme must have the capacity to adequately address and respond to exploitation, harassment and other forms of mistreatment of workers, including non-payment or underpayment of wages, superannuation entitlements, Return to Work Premiums, and avoidance of taxation liabilities. Civil and criminal penalties should be imposed on directors of companies that deliberately phoenix, avoid registering or avoid other requirements in the legislation, and are caught exploiting or underpaying workers.

Consistent with the above, unions support the following key features of a labour hire licensing scheme:

- 1) A threshold capital requirement a company must demonstrate in order to become an licensed labour hire company:
 - A capital requirement acts as an effective barrier to entry by excluding small, undercapitalised start-ups from entering the market until they have sufficient capital to properly maintain compliance with workers compensation, payroll, and superannuation payments.

- 2) A bond to be paid in order to operate as a labour hire company
 - Bonds protect employees employed by smaller companies from losing their entitlements should the company become insolvent. Interest earned on the bonds can also be used to help fund a compliance agency, as described below.

- 3) A dedicated and well-resourced compliance agency responsible for initial licensing and ongoing monitoring of the activities of labour hire companies through yearly audits and associated compliance activities. The compliance agency would:
- i) Perform 'Fit and Proper' tests (including criminal and bankruptcy checks) on labour hire company employees, as part of the initial licensing process. This is particularly important to ensure organised crime can be kept out of the labour hire industry. Employees found to have a history of breaching workplace or occupational health and safety laws may not become licensed, or can have their licence as a labour hire operator revoked or suspended.
 - ii) Review yearly reports provided by agencies on the number of employees they are providing to host work places and the remittance paid to them.
 - iii) Provide governments with a strong understanding of the companies operating in the labour hire industry.
 - iv) Link with the Fair Work Ombudsman and the Fair Work Commission to investigate, enforce and punish any systemic breaches of workplace laws.
 - v) Provide for tripartite governance and oversight of licensing arrangements.

While it is important to have a dedicated, well-resourced agency, as proposed above, it should be recognised that government agencies have thus far not been able to address widespread exploitation as evidenced by the 4 Corners program. As such, it is imperative that unions have the capacity to enforce and prosecute labour hire companies as well.

The licensing system we propose would apply to the labour hire industry as a whole. However, additional, more stringent requirements should be applied to those labour hire agencies that seek to engage temporary work visa holders, given the weight of evidence of the particularly vulnerable situation those workers are in. This could include requirements for a minimum period of operation (2 years or more) and an exemplary record of compliance with laws and obligations before an agency could engage temporary overseas workers.

The establishment of a labour hire licensing scheme would not be a unique or radical move – the UK, Canada, South Korea, Japan, Singapore, Germany, Austria, Spain, Luxembourg, the Netherlands, Sweden, Belgium, France, Italy and Portugal all operate licensing systems or codes of conduct that protect the rights and entitlements of labour hire employees. Australia is one of the few OECD countries with no regulation or licensing for labour hire companies.

Finally, we make the point that labour hire licensing will not solve the problems in and of itself, and it should form part of a suite of measures.

English language testing

We reiterate the material in our written submission about the critical importance of English language standards. Policy-makers should continue to reject the regular, and, in our view, often self-serving calls for such standards to be diluted or removed.

On this point, it is of grave concern to see the recently-released text of the China-Australia Free Trade Agreement make specific provision for Investment Facilitation Agreements (IFAs) that would allow Chinese companies to negotiate concessions to bring in lower-skilled workers with lower-level English language skills than would otherwise be allowed under the standard 457 visa program. This has implications for safety and makes those workers more vulnerable to mistreatment and exploitation. No other FTA has made specific provision for such 'concessions' to be made to the standard 457 visa requirements.

Data gaps

Our written submission identified a number of areas where better information and data would improve the rigour and transparency of the temporary work visa program. There is no evidence we are aware of that this information is currently available. The relevant recommendations from our written submission include:

- DIBP be responsible for providing publically available information on the operation of 457 visa labour market testing provisions. The ACTU written submission (see appendix one) outlines the type of information should be collected.
- DIBP be responsible for providing publically available information on the domestic training effort of sponsoring employers under the 457 visa program. The ACTU written submission (p. 58) outlines the type of information that should be collected.
- DIBP to conduct a public assessment and review of the potential impact the additional labour supply from the 417 working holiday visa program has on employment opportunities, as well as wages and conditions, particularly on young Australians in lower-skilled parts of the labour market. The review should be conducted with the oversight of the tripartite Ministerial Advisory Council for Skilled Migration (MACSM).
- DIBP to provide consolidated and publically available information on the working patterns of working holiday visa holders, as outlined in the ACTU written submission (p.43). If this information is not currently able to be produced, then DIBP should report to MACSM on how this data can be collected.
- DIBP to provide consolidated and publically available information on the working patterns of student visa holders, as outlined in the ACTU written submission (p.45). If this information is not currently able to be produced, DIBP should report to MACSM on how this data can be collected from the visa holder and/or their employers.

In relation to apprenticeships in particular, it is inconceivable that the Department or Government are not able to provide information on the domestic training effort of 457 visa sponsors. This is a glaring hole in the oversight of the program that must be rectified. Without this information, it is simply not possible to verify if in fact there is any training dividend from the 457 visa program.

31 July 2015
ACTU
D No. 103/2015

CHAIR: Can you take on notice for us and maybe set out in a document how unions through industrial staff—lawyers and other specialised staff—use the Fair Work Commission, the Federal Court and the Magistrates Court to pursue unfair dismissals, breaches of the award, underpayments and that sort of thing so that we have a clear understanding of what your key unions do?

Ms Kearney: Yes.

ACTU response

In answer to this question, we first provide some general commentary on the options available to unions to pursue various matters on behalf of their members. For illustrative purposes, we then cite the experience of one of our affiliated unions, the National Union of Workers (NUW), in relation to their representation of temporary work visa holders.

There are a number of institutional options available for unions to pursue breaches of workplace laws on behalf of their members. Unions are given particular rights to act in a representative capacity in bringing proceedings in particular State, Territory and Federal Courts in relation to breaches of Awards, Enterprise Agreements and the National Minimum Wage Orders, which are the instruments where many workers' rates of pay are found. Enforcement of any "above award" wages or entitlements is a more complex issue as unions are not permitted to bring breach of contract claims on a member's behalf. Unions are however permitted to act in a representative capacity in relation to other specific penalty proceedings, including in relation to sham contracting and other General Protections (such as a worker's right not to be dismissed or injured in their employment because of a complaint). Unions have in-house industrial staff and some lawyers who can prepare and conduct these proceedings, however they can be resource intensive. Many unions engage law firms to conduct these matters on their behalf after some preparatory steps have been taken in house.

Augmenting the representative role of unions in these types of proceedings (but not contractual proceedings) are the investigative rights contained in Subdivision A of Division 2 of Part 3-4 of the Fair Work Act. These allow union officials who hold regulator approved entry permits to access documents held at (or accessible via computer from) the place where the member works, provided notice is given and provided the union official reasonably suspect a contravention has occurred. These rights can be exceedingly valuable in confirming a member's instructions, advising them of their options and in opening up dialogue which might lead to a resolution of the dispute.

There are however a number of practical realities that make the formal options available of less utility than face value may suggest. Firstly, the investigative rights we refer to above are severed when the member loses their job, so they are not able to be utilised in post-employment situations where there is an unpaid amount in dispute. This counter-intuitive limitation has been raised as a problem with successive governments and none have been moved to rectify it. Secondly, in labour hire situations the right to examine documents on or accessible from the premises where the member works does not ordinarily provide access to documents held by the person that employs the worker – the labour hire agency. Because the worker does not ordinarily perform any work on the premises of the labour hire company, there is no right to access the documents of the labour hire company either. To achieve that end, the union official must first enter the place where the worker performs the work (knowing that the documents he or she seeks are not located there), ask for the documents to be produced (knowing they can't be), then serve a separate notice to the labour hire company requiring that they be made available – there is no power to demand documents from the labour hire provider without first entering the premises of the host employer.

Separate to these matters are unfair dismissal proceedings. These too are notoriously difficult to successfully prosecute in labour hire situations. This is partly because of casualisation (meaning workers have no rights to unfair dismissal protection unless they have worked regular and systematic shifts for 6-12 months) and partly because the nature of the legal relationship can be difficult to discern. Host employers who ultimately direct and supervise the day to day work cannot be subject to unfair dismissal claims where the workers are made available to them by a labour hire agency, other than in the most exceptional circumstances. Rather, for many labour hire workers who are told not to come back to work tomorrow, the law does not even recognise that they have been dismissed.

The NUW is one of many unions who represent temporary overseas workers in a range of matters before various courts and tribunals. Given that most workers on temporary working visas do not speak English as a first language, the assistance and representation by unions is crucial.

The NUW regularly brings matters before the Fair Work Commission (FWC) and Federal Circuit Court for members who are on a temporary working visa. The FWC is largely used to pursue unfair dismissal and general protections matters. The NUW represents members in the FWC by acting as their advocate for all stages of the matter.

One example where the NUW successfully used the FWC to combat exploitation of migrant workers was in the case of *Vannea v Royal Bay International Pty Ltd* [2014] FWC 6416. This case involved a migrant worker who was engaged as an 'independent contractor' at Baiada's Adelaide factory. He had been terminated via text message due to being injured at work and missing a shift. The NUW made an application for unfair dismissal and represented their members during the hearing before the FWC. The FWC found that Mr Vannea was not an independent contractor and that the company had

been misrepresenting the employment relationship. Mr Vannea was reinstated to his previous job, but this time as an employee. This resulted in him now being paid the legal minimum and other entitlements that he had not received previously (such as overtime, shift loadings, superannuation etc). Mr Vannea was also awarded \$32,000 in back pay.

The NUW also regularly use the Federal Circuit Court to pursue back pay for underpayment of wages for members. The NUW often seen migrant workers being paid wages that are significantly below the legal minimum, as well as many cases where workers are not paid other entitlements such as superannuation, overtime, shift loadings and penalty rates. The NUW pursues these matters by making applications to the FCC for back payment of wages. The NUW represents these workers throughout the entire matter, including by making the application, following procedural requirements and representing the member at the hearing. The NUW also assists members in enforcing the orders for back pay.

CHAIR: The second thing you could take on notice is in relation to the meat union in Brisbane who gave us evidence of labour hire companies using the individual flexibility agreements within awards to further reduce workers entitlements. That was a practice of labour hire. I wonder if you could ask unions if they have any examples of that?

Ms Kearney: We are happy to do that.

ACTU response

Australian unions have long been concerned by the potential for exploitation arising from Individual Flexibility Arrangements (IFAs) affecting all workers, whether they be Australian citizens, permanent residents or temporary work visa holders. The best data available on IFAs comes from the reports published by the General Manager of Fair Work Australia. We examined the initial reports closely and they strengthened our view that the formal safeguards on IFAs were proving to be ineffective at avoiding the types of exploitation that were observed under WorkChoices-era Australian Workplace Agreements. We have enclosed a copy of the report we released in relation to this matter. We understand that the next iteration of the General Manager's report will draw on data collected through the Australian Workplace Relations Study and may provide some additional insights.

4. HANSARD, PAGE 10

Senator McKENZIE: I have some questions that can go on notice. We heard evidence last week from a local employer in regional Victoria, Hazeldene's poultry, who is a fantastic, fabulous local employer in the Bendigo region and who obviously uses a highly skilled workforce, particularly boners. Are you aware of a concerted campaign by certain affiliated unions around the time of EBA negotiations to embarrass and shame those legitimate businesses who were using and relying on 457 or 417 visas to keep their doors open?

Ms Kearney: I am not aware.

Senator McKENZIE: You are not aware. Thank you.

ACTU response

The ACTU has nothing further to add to the answer provided at the hearing.

23 July 2015

D No. 95/2015



“One Out

the **Abbott Government**
and the return of unfair
individual contracts”

ACTU
australian council of trade unions

Australian
Unions
Join. For a
better life.

Foreword

Along with removing unfair dismissal protections and gutting the power of the independent umpire, the signature element of WorkChoices was unfair individual contracts called Australian Workplace Agreements (AWAs). AWAs were a key reason that the Australian people rejected the WorkChoices regime.

In the last year or so that WorkChoices was in operation, around 1000 workers a day were being put on AWAs. An enormous number of these contracts were deeply unfair to working people. Around 70% removed shift loadings and annual leave loading, 65% removed penalty rates, half removed public holiday penalties and overtime pay and nearly a third removed rest breaks.

There is a myth that AWAs were handcrafted, bespoke, arrangements tailored to the specific needs of individual workers and their boss. The reality was that at a given employer or even industry level they were almost always identical, template, take it or leave it offers, handed out at hiring or used to get workers to individually concede to things that they would not agree to collectively. In reality there were two types of AWAs although sometimes they overlapped – the ones that cut pay and conditions and the ones used as part of a de-unionisation push.

Labor's Fair Work Act abolished AWAs. The ability to tailor working conditions is included in Modern Awards, Enterprise Agreements and a mechanism called Individual Flexibility Agreements (IFAs). Crucially, the IFA process includes a series of procedural and substantive requirements designed to protect workers.

Now, these protections are under threat. This paper analyses an attempt by the Abbott government to restore many of the worst aspects of AWAs by amending the legislation that governs IFAs.

It is difficult to believe that, less than 7 years after they lost a Federal election in which unfair IR arrangements were a very significant factor, the Coalition is back to its old tricks.

Yet, as this analysis demonstrates that's exactly what is happening.

Australian Unions have had to organise and campaign to defeat these sorts of unfair individual contracts before. And we will do it again.

Tim Lyons
Assistant Secretary

Contents

Foreword	1
Contents	2
1. Summary of findings.....	3
2. Introduction	4
3. Individual Bargaining under WorkChoices	5
4. Individual Bargaining under the Fair Work Act.....	9
5. The Proposed Amendments	14
6. Conclusion	22

1. Summary of findings

This paper examines the likely impacts of the Coalition government's proposed new industrial relations legislation concerning individual employment agreements, by reference to the recent experience of individual bargaining mechanisms available under the *Fair Work Act* and the *Workplace Relations Act*. This comparative analysis demonstrates that:

- Individual bargaining under the *Workplace Relations Act* resulted in the exploitation of workers;
- The limited safeguards to individual bargaining which were introduced by the *Fair Work Act* have proven to be largely ineffective and poorly observed;
- Legal mechanisms currently exist in the *Fair Work Act* to compensate workers if exploitative agreements are made unlawfully in breach of those safeguards;
- The Government's proposals deliberately undermine those legal mechanisms and the safeguards that give rise to them;
- The Government's proposals extend beyond what the Coalition disclosed in its pre-election policy and will serve to increase the incidence of exploitation.

2. Introduction

On the 27th of March 2014 the Government introduced legislation in order to implement elements of the Coalition's industrial relations policy and various recommendations made by the Fair Work Review Panel ("the Panel").

The *Fair Work Amendment Bill 2014* ("the Bill") contains a range of amendments to the Fair Work Act ("the Act") that will have a detrimental impact on Australian workers and their families.

The ACTU believes that the Bill goes well beyond the public policy position that was outlined by the Government prior to the 2013 election and seeks to bring back key elements of the WorkChoices regime. In particular, 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 which were designed to ensure that legitimate flexibility is exercised in a way which is not detrimental to employees.

The Act currently provides that modern awards and enterprise agreements must include a "flexibility term". A flexibility term enables an employee and his or her employer to agree to an Individual Flexibility Arrangement ("IFA"). An IFA varies the effect of particular terms of the applicable award or enterprise agreement in order to meet the genuine needs of the parties. The content of the flexibility term is regulated by the Act, for example the Act requires that the flexibility term set out the terms of the award or the agreement that may be varied by an IFA.

The proposed amendments directly affect what the flexibility term in awards and agreements will look like, how it will work and how IFAs are enforced and terminated. These amendments undermine a number of safeguards that were designed to address significant problems associated with Australian Workplace Agreements ("AWAs") and which sought to ensure that IFAs could not be used by employers to exploit vulnerable employees or drive down wages or conditions of employment.

This paper provides an analysis of the proposed amendments to the Act with respect to IFAs and the flexibility terms under which they will be made. In order to properly understand the consequences of these changes, it is necessary to briefly revisit the operation of AWAs and the effect that these arrangements had on terms and conditions of employment – hence the next chapter of this paper focuses on individual bargaining under WorkChoices. Chapter 4 outlines the current provisions of the Act and the ineffectiveness of existing safeguards on the operation of IFAs. Chapter 5 discusses the specific amendments contained in the Bill and their likely effect on employees' working conditions.

3. Individual Bargaining under WorkChoices

Individual statutory contracts, known as AWAs, were first introduced by the Workplace Relations 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 Conditions 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.

In addition, workers could be compelled to accept an AWA that removed entitlements as a condition of employment or promotion¹. 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.

¹ *Workplace Relations Act 1996*, section 400(6).

At the end of December 2007, the Workplace Authority estimated that around 880,000 employees (9.6%) were on AWAs.² The majority of AWAs were made with employees in low paid sectors of the economy. The retail, hospitality and personal services sectors accounted for 55% of all AWAs lodged³, which are sectors where the level of dependency on the award safety net has traditionally been and remains at high levels⁴.

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% excluded all protected award conditions.⁵

Further data compiled by the Workplace Authority shows that 89% of the 1,748 AWAs lodged between April and September 2006 removed at least one protected award condition, 71% excluded four or more, 52% excluded six or more and 2% 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%).⁶

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

² 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.

³ Workplace Authority, 'Lodgement Data: 27 March 2006-30 September 2007' (2007) p 5.

⁴ ABS data (6306-May 2012) indicates that 63.9% of award dependent employees are engaged in the accommodation and food services, retail trade, Health care and social assistance and administrative and support services industries.

⁵ Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

⁶ 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.

for removal. In the case of overtime pay, the rate at which it was removed through AWAs doubled from a quarter of AWAs in 2002-03 to over a half of AWAs in 2006.⁷

Employers commonly used AWAs to increase hours of work. The average AWA employee worked a 13% longer week than their peers employed under a collective arrangement.⁸ Often employees on AWAs worked longer hours for less pay. For example in New South Wales, female AWA employees worked 4.4% longer hours than their counterparts engaged under collective agreements, but earned 11.2% less.⁹

It was also common practice not to provide any wage increase over the life of the AWA. 22% of AWAs in April 2006 contained no provision for a wage increase during the life of the agreement and this figure rose to 34% in April-September 2006.¹⁰

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.¹¹

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% below average earnings of workers reliant on the award minimum respectively.¹²

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%¹³ and female casual workers on AWAs received average earnings some 7.5% below average award earnings.¹⁴

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.

⁷David Peetz and Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data' (2007) p 4.

⁸ ABS cat 6306.0 (May 2006) p 33.

⁹ ABS cat 6306.0 (May 2006) Table 10.

¹⁰ David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 64.

¹¹ Peetz and Preston, p 13.

¹² David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 67.

¹³ Ibid, p 29.

¹⁴ Ibid, p 67.

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 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 sections of the manufacturing, hospitality and retail industries. Such non-compliance particularly affects vulnerable workers including young workers, women, those working in precarious employment, outworkers and employees working in workplaces without a union presence.

4. Individual Bargaining under the Fair Work 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;¹⁵
- must pass the “Better Off Overall Test” (BOOT), meaning that the IFA must result in the employee being better off overall than they would have been had no agreement been made;¹⁶
- can only be made after the employee has commenced employment;¹⁷
- 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;¹⁸
- may be terminated by either party giving written notice or immediately if the parties agree.¹⁹

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.²⁰

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.²¹ 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 agreement.²² 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. The concern was that, in practice, some or all of these safeguards would not be observed or effective. Indeed, over the period of operation of the Act 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.

¹⁵ s144(4)(b), 203(3).

¹⁶ s144(4)(c), 203(4).

¹⁷ s144(4)(d), Modern award clause 7.2.

¹⁸ s144(4)(e), 203(7).

¹⁹ s144(4)(d), 203(6).

²⁰ Modern award clause 7.2.

²¹ 203(2)(a).

²² 203(4),203(5).

The most comprehensive source of data on IFAs to date is the report of the General Manager of Fair Work Australia, published in November 2012.²³ 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 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% 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% of employees.²⁴
- Employers reported that most reviews, modifications and terminations of IFAs were employer-initiated (around 70%).²⁵
- The drafting process is largely controlled by employers. 85-88% of employers are involved in drafting the content of IFAs compared with approximately 36-38% of employees.²⁶
- 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.²⁷

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

- The majority of multiple IFA employers (54%) admitted that they required all employees to sign IFA documentation to either commence or continue their employment.²⁸
- For employers that had made an IFA with only one employee, around 35% indicated they had required an employee to sign the IFA to commence or continue employment.²⁹ Such

²³ General Manager's Report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012, (2012).

²⁴ Figure 4.1, Table 4.1.

²⁵ Table 4.4, Table 4.7

²⁶ Table 4.3, Table 4.6.

²⁷ Table 4.6.

²⁸ Table 4.6.

²⁹ Table 4.3.

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 obligation to do so. 18% of single IFA employers and 27% of multi-IFA employers reported that they did not assess whether the employee was better off overall.³⁰
- 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.³¹

These findings highlight the fact that existing safeguards on the use of IFAs are relatively ineffectual as a means of protecting employees. The absence of external scrutiny in relation to the content of IFAs and the process of making them 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, there have been 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.

Another specific example 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.

³⁰ Table 5.5, Table 5.7.

³¹ p 71.

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 where workers are highly dependent on the award safety net. The ACTU understands that in these industries IFAs are commonly used to alter penalty rates, overtime pay 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.³²

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.³³ Moreover, such an approach does not demonstrate an 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, 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*³⁴, 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 the Act. The court fined the operators of the company a total of \$30 000.

³² These observations are based on an analysis of IFAs compiled by United Voice.

³³ Fair Work Ombudsman, ‘Qld - Pharmacy Industry Audit Program Report 2011’, (2012) 11.

³⁴ [2011] FCA 1064.

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.

Sophisticated employers that wish to avoid their legal obligations tend 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 an agreement is reached is generally not subject to external scrutiny and consequently all but the most egregious breaches remain undetected.

5. The Proposed Amendments

The existing issues identified with the abuse and manipulation of IFAs will 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 and the flexibility terms under which they are made. 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 employees 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.

While 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,”³⁵ the Bill evinces nothing to this effect.

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

³⁵ 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 modern 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.³⁶

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.³⁷ The General Manager's Report on IFAs found that less than 1% 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.³⁸

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 to ensure that unforeseen developments, that render a flexibility agreement not only unacceptable to one of the parties but also substantially unfair, can be addressed.³⁹

³⁶ See Modern Awards Review 2012 - Award Flexibility Decision, [2013] FWCFB 2170.

³⁷ [2013] FWCFB 2170, [171].

³⁸ Table 4.2.

³⁹ [2013] FWCFB 2170, [175].

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.

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”.⁴⁰

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 pursuant to the flexibility terms in 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.⁴¹ 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

⁴⁰ Fair Work Amendment Bill 2014, Item 14.

⁴¹ Fair Work Amendment Bill 2014, Item 204A.

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.

Currently, if an IFA is defective because the employer did not comply with one of the safeguards (for example, if the employer did not ensure that the employee was better off overall), the IFA itself remains valid and in place (until withdrawn from). However, because those safeguards were not complied with in relation to the making of the IFA, the Act deems that the flexibility term has been contravened.⁴² Prosecutions for breach of the flexibility term can result in the employer being fined and ordered to pay compensation to workers, if IFA did not in fact result in the worker being "better off overall".⁴³

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 believes that these amendments are likely to completely undermine the protection afforded to employees by the BOOT and the requirement that an IFA be genuinely agreed to.

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. Indeed at least one employer group has stated that "These amendments may contribute to making IFAs more attractive for employers because the spectre of a penalty for non-compliance is removed"⁴⁴.

⁴² s145 (3).

⁴³ See Part 4-1 of the Act.

⁴⁴ VECCI Submission to the Senate Education and Employment Legislation Committee, 24 April 2014, Page 4.

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 Fair Work Act Review 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 result in an individual employee being better off overall.⁴⁵ 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 Spotless employees would become permissible.

Other examples of IFAs that may be 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;

⁴⁵ [2013] FWCFB 2170, [136].

- 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 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.⁴⁶

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 an 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.

The current legislation allows the content of flexibility terms in enterprise agreements to be narrower in scope than the model flexibility term. The Explanatory Memorandum to the Bill 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”.⁴⁷

This statement is misleading. There is nothing to prevent employers providing individual employees with access to additional flexibilities either through an informal arrangement, a formal arrangement pursuant to the “right to request” provisions of the National Employment

⁴⁶ Recommendation 9, Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation.

⁴⁷ Explanatory Memorandum, p xxix.

Standards 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 in 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.

Consideration in the Senate

The Bill was referred to a Senate Inquiry which reported on 5 June 2014. Coalition Senators, Labor Senators and Greens Senators each produced a separate report.

Only the Coalition Senators' report recommended that the Senate pass the Bill. In doing so, the Coalition Senators demonstrated an astonishing lack of understanding of the Bill. In particular, the Coalition Senators' report:

- asserts that "the Bill provides that it is the employee's choice to seek an IFA"⁴⁸ (which clearly is not the case); and
- concludes that the provisions of the Bill which impact on IFAs "would have the effect of addressing recommendations 9, 19, 20 and 23 of the Fair Work Review Panel"⁴⁹. Recommendation 9 of the Fair Work Review Panel contained *limitations* on the capacity to trade off monetary entitlements for non-monetary benefits, which have not been

⁴⁸ Senate Education and Employment Legislation Committee, Fair Work Amendment Bill 2014 [provisions], June 2014, at 15.

⁴⁹ *Ibid.* at p 16

implemented in the Bill. Further, recommendations 19, 20 and 23 have nothing to do with IFAs and are not addressed in the Bill at all. Further, they are not referenced in the Coalition's pre election policy and two of those recommendations (recommendations 19 and 23) were in fact implemented by the previous government and are part of the current law.

It is unclear whether the Government will move to force the what appears to be a hostile Senate to vote on the Bill, or whether it wait until the composition of the Senate changes post 1 July.

6. Conclusion

The passage of this Bill will provide the green light to unscrupulous employers seeking to exploit workers on statutory individual contracts.

Even if one assumes that the current Senate will be presented with the Bill and vote against it, this is not the end of the matter, as the Bill may be brought back to the Parliament after 1 July when the composition of the Senate has changed.

It is not certain that the Bill will be in identical terms should it be re-introduced after that date.

It is clear that the Bill must be opposed if the current deficiencies in IFAs as we know them are to be contained and if the risks identified in this paper are to be avoided. In addition, there are warning signs that a future version of the Bill may attempt to go even further and present additional risks if not guarantees of significant exploitation. These warning signs come in the form of urgings by employer groups to allow IFAs to alter core conditions in the National Employment Standards (so as to provide, for example, for sick leave to be cashed out)⁵⁰, to introduce a requirement that an IFA be entered into as a condition of employment (no IFA, no start)⁵¹, and to re-embrace broad scale independent statutory employment agreements (such as WorkChoices era AWAs)⁵². If the Coalition Senators' recently published report on the Bill is anything to go by, these wish lists could be waived through by the Government without any real scrutiny let alone any attempt to understand their impacts on workers.

Whichever path is taken, it is clear that any future version of the Bill that this government brings forward will present a very real threat to the working conditions of every worker in Australia, particularly those who currently receive only safety net conditions.

⁵⁰ ACCI Submission to the Senate Education and Employment Legislation Committee, April 2014, Page 19.

⁵¹ MBA Submission to the Senate Education and Employment Legislation Committee, 24 April 2014, Page 6.

⁵² VECCI Submission to the Senate Education and Employment Legislation Committee, 24 April 2014, Page 3.

ADDRESS

ACTU
365 Queen Street
Melbourne VIC 3000

PHONE

1300 486 466

WEB

actu.org.au

D No: 55 - 2014



Australian
Unions
**Join. For a
better life.**

Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Sydney, NSW

Questions taken on notice –AMIEU

1. HANSARD, PAGE 15

Senator McKENZIE: Could you take on notice the proportion of cases that you have had that you took to the Fair Work Ombudsman or pursued through the courts? On notice would be fine; we do not need to go into that now.

Mr Courtney: That is fine.

Good morning ,

The AMIEU has notified the FWO on most occasions (around 70%) relating to visa worker exploitation across the meat and poultry processing industries since early 2011. The form of notification ranged from telephone calls to emails. We have pursued all other cases directly through the courts .

Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Sydney, NSW

Questions on notice – National Farmers Federation

1. HANSARD, PAGE 37

Mr Roach: I pay the poultry worker award.

Senator O'NEILL: Which is how much?

Mr Roach: My wife is an accountant. She covers that side of things.

Senator O'NEILL: If you could take that on notice, that would be helpful. This person that you employ as a casual worker gets to do the work on the poultry farm on a cycle of roughly every two months for about a two- or three-week period?

3. Rates of pay in the Pastoral Award 2010 covering poultry workers

<http://www.fairwork.gov.au/ArticleDocuments/872/pastoral-award-ma000035-pay-guide.docx.aspx>

Pay Guide - Pastoral Award 2010 [MA000035]

Published by the Fair Work Ombudsman on 29 June 2015

Poultry farm worker - Full-time & part-time

Classification	Weekly pay rate	Hourly pay rate	Public holiday - poultry farming employees	Overtime - Monday to Saturday - poultry farming	Overtime - Sunday - not for the purpose of feeding and watering stock - poultry farming	Overtime - Sunday - for the purpose of feeding and watering stock - poultry farming	Delayed meal break
Poultry farm worker level 1	\$656.90	\$17.29	\$34.58	\$25.94	\$34.58	\$25.94	\$34.58
Poultry farm worker level 2	\$685.50	\$18.04	\$36.08	\$27.06	\$36.08	\$27.06	\$36.08
Poultry farm worker level 3	\$714.40	\$18.80	\$37.60	\$28.20	\$37.60	\$28.20	\$37.60
Poultry farm worker level 4	\$764.90	\$20.13	\$40.26	\$30.20	\$40.26	\$30.20	\$40.26

Senator O'NEILL: That is one of the concerns that has been raised with us. Can I take you, Miss McKinnon, to labour market testing once more? In your evidence today, you called it red tape. I would like to ask you to give me some more of your thoughts about labour market testing, frankly, because there seems to be an awful lot of unemployed young people out the bush. We had evidence, as Senator Lines said, about local agencies being contacted, people seeking employment and not being able to get it.

Ms McKinnon: I have to say that is not what I hear. I think that, yes, there are lots of young people in the bush who are looking for work but they are not necessarily knocking down the farmer's door. Gumtree was just discussed as a forum for finding employment. I can table, on notice, if it is useful, an ad that I found on Gumtree for backpackers looking for farm work.

UNLIMITED + **ADSL2+** with HOME PHONE LINE RENTAL

Local Calls **Unlimited**
 STD National Calls **Unlimited**
 International **100 Minutes**

\$69.99 P/m
 MIN CHARGE \$1,788.71
 WI-FI MODEM INCLUDED

24 MONTH PLAN **IRG**

Post ad **FREE** My Gumtree **Browse ads**

Sign in



+ 0 km

All Categories

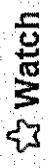


I'm looking for...

Home > Murrumbidgee Area > Sydneyham > Clothing & Jewellery > Accessories > Ad ID 1068546277

Couple require farm work. Free

199 [pyrmont street sydney](#)



Date Listed: 24/01/2015

Last Edited: 23/01/2015

Condition: New

Josh naylor
Gumtree since 2014

Friendly English male and female desperate for farm work to get our second year visa. Preferably hourly paid if possible. Willing to travel to any destination required and to work any hours given.

***** 124 [show number](#)

Today's Top Money Deals



[Send message](#)