AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

Education and Employment Legislation Committee

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

December 2015

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes to ensure the Australian resource industry is an attractive place to invest, do business, and create jobs.

Having actively served resource employers for more than 97 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

Our members include companies working in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to those industries.

The resource industry currently employs more than 1.1 million people either directly or indirectly and accounts for 18% of economic activity in Australia[1] (double its share of a decade ago).

Australia's earnings from resources and energy commodities are forecast to increase to around $178 billion in 2015-16[2].

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[1] Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom*, February 2013
[2] Office of the Chief Economist, *Resources and Energy Quarterly—June Quarter 2015*

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INTRODUCTION

1. On 11 November 2015, Parliament passed the *Fair Work Amendment Bill 2014* in heavily amended form. Of the original 10 Parts in the 2014 Bill, Parliament passed just four (in amended form), in the areas of:

   a. Schedule 1, Part 1—Extension of period of unpaid parental leave

   b. Schedule 1, Part 5—Greenfields agreements

   c. Schedule 1, Part 7—Protected action ballot orders

   d. Schedule 1, Part 10—Unclaimed money

2. On 3 December 2015, the Government reintroduced the remaining provisions from as the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

3. On 3 December 2015, the Senate referred an inquiry into the ***provisions*** of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* to the Education and Employment Legislation Committee for inquiry and report by 4 February 2016.

4. AMMA strongly supports passage of the remaining measures consistent with the resource industry's support for all parts of the 2014 Bill.

5. Particular priorities for employers in the resource industry remain[3]:

   a. Schedule 1 – Part 5 – Union Entry

   b. Schedule 1 – Part 4 – Transfer of Business

   c. Schedule 1 – Part 1 – Payment for Annual Leave

   d. Schedule 1 – Part 2 – Leave while receiving workers' compensation

   e. Schedule 1 – Part 3 - IFAs

6. This submission is in three (3) parts:

   Part A: Responds to concerns raised by Senators and Members in declining to pass the various schedules from the 2014 Bill in October/November that have now been put again to the Parliament through the *Remaining Measures Bill*.

   Part B: Reproduces AMMA's previous submission to this Committee in support of the various schedules in the 2014 Bill[4], renumbered and reordered to reflect the equivalent provisions of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

[3] Using the numbering of the Remaining Measures Bill.
[4] AMMA (2015) Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment Bill 2014 (Submission #26), http://www.aph.gov.au/DocumentStore.ashx?id=15c617aa-05e8-412f-8adc-b8c00f58efa5&subId=252087

Part C: Reproduces AMMA's October 2015 submission to the Australian Government's Post Implementation Review of those parts of the *Fair Work Act 2009* that commenced on 1 January 2014; in particular on the following 'right of entry' matters:

- Requirements that an employer or occupier facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations.

- New eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting interviews with one or more employees.

- Amendments made by the *Fair Work Amendment Act 2013* relating to the default location of interviews and discussions.

- Expanding the FWC's capacity to deal with disputes about the frequency of union visits to premises for discussion purposes.

This provides practical examples of the complications, misuse and problems being caused by the right of entry changes under the *Fair Work Amendment Act 2013,* and the grounds on which **AMMA supports the passage of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*, particularly Schedule 1, Part 5.**

PART A – RESPONSES TO MATTERS RAISED IN NOT PASSING PREVIOUS AMENDMENTS

7. Six of the 10 schedules in the *Fair Work Amendment Bill 2014* were not passed in November 2015 and have been reintroduced in the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

8. To assist the Committee in considering the 2015 Bill, AMMA has reviewed and responded to:

   a. This Committee's report on the provisions of the *Fair Work Amendment Bill 2014*, including the Greens and Labor Senators' dissenting reports (5 June 2014)[5].

   b. Transcript from the Committee's hearings on the 2014 Bill (held on 14 May 2014)[6].

   c. Hansard from the passage of the amended 2014 Bill through both the Senate and House.

   d. The various schedules of Senate amendments relevant to the unpassed parts of 2014 bill that have been reintroduced as the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

   e. AMMA has also taken note of the Explanatory Memorandum (EM) for the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

9. This Part A of AMMA's submission responds to key issues raised by Opposition and Cross Bench Senators in not passing these important, positive amendments on the previous occasion.

10. On the basis of these clarifications and responses, the Senate should conclude that the concerns that previously held up passage of the 2014 amendments have been discharged, and that the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* **should be passed expeditiously, and in full**.

[5] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Work_Amendment
[6] http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F80382649-affa-4721-b738-3a258212cd04%2F0000%22

SCH 1 – PART 1 – PAYMENT FOR ANNUAL LEAVE

11. This Part would amend (principally) s.90(2) of the Fair Work Act, by amending the definition of 'payment for annual leave'.

12. Such an amendment will restore the long-standing status quo on how unused annual leave should be paid out when employment ends, and end the confusion and disputation created by the accidental anomaly arising from erroneous drafting in the 2009 package of 'Fair Work' amendments.

13. Annual leave loading was only traditionally payable when someone proceeded on leave during the course of their employment, and not when they resigned or were dismissed. In a minority of cases an exception to this rule may have been explicitly provided for in an award. Schedule 1, Part 1, Item 3 will restore the long standing status quo and remove the ambiguity which plagues the National Employment Standards on annual leave following under the *Fair Work Act 2009*.

14. Specifically, it will address inconsistent interpretations applied by the Workplace Ombudsman that are at odds with long standing practices under awards, and with the long standing expectations of both employers and employees.

15. Equivalent provisions were included in the 2014 Bill, as Part 2 of Schedule 1.

16. This section identifies and seeks to rebut arguments advanced against amendments which essentially clarify what should have been clear and uninterrupted in the transition to the post-2009 legislation.

An independent review, appointed by Labor specifically recommended these changes (August 2012)

17. When in government Labor appointed the Fair Work Review Panel to address rapidly emerging problems with the operation of the *Fair Work Act 2009*.

18. The Review Panel specifically addresses the payment of leave loading on termination of employment, and the accidental change wrought to the long standing status quo by the drafting of the 2009 amendments:

> *For employers who traditionally have not had to pay annual leave loading on termination, they have incurred an additional cost in paying out the annual leave on termination. Leave loading typically amounts to 17.5 per cent on the base rate of pay, depending on the relevant modern award or enterprise agreement. It is impossible to quantify the cost of this change to the economy overall, as there is no way to gauge how much leave is owed to employees whose employment has been terminated, what their base rate of pay is, what the relevant leave loading is, how many employees are covered by awards or agreements that provide leave loading and whether all employers have been meeting the new requirement. It is, however, noted that the interpretation of the requirement would have the most negative impact on affected small*

> *businesses. The benefit to employees covered by instruments that previously had not attracted leave loading on separation is that they are entitled to be paid leave loading on top of leave owed to them when leaving their employment.*
>
> *Backed with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s. 90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees.*[7]

19. The Review Panel recommended:

> *Recommendation 6: …that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.*[8]

20. This is exactly what Item 3, Part 1, Schedule 1 of the Fair Work Amendment (Remaining 2014 Measures) Bill will do:

> *The amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.*[9]

This would not remove annual leave loading

21. Mr Champion stated during the course of debate in the House:

> *What else do we find in the bill? We find changes to annual leave loadings and shift loadings. Shift workers all over the country, people who regularly work late at night or on Sundays, get their shift loading when they go on annual leave because it is part of their normal income. But hidden away in this bill is this: if it is not in your award, if it is not expressly provided for in your agreement, out it goes. That is the first little slice of the onion towards removing those sorts of conditions—removing annual leave loading, which the coalition have been trying to get rid of since the seventies, and removing the right of shift workers to loadings when they are on annual leave which are part of their normal income. The reason those provisions were put in place was that often shift workers would work 50 weeks of the year, working nights and getting a shift loading of an extra 30 per cent, and when they went on holiday their income would actually drop. That is*

[7] Fair Work Review Panel (2012) p.100
[8] Fair Work Review Panel (2012) p.100
[9] Fair Work Amendment (Remaining 2014 Measures) Bill 2015, Explanatory Memorandum, p.2, ¶2

> *why those provisions were put in place—because of that blatant unfairness.*[10]

22. Mr Champion is quite correct that the origins of annual leave loading lie in a possible step down of pay for 1970s shift workers when going on leave, but part of this safety net setting has always been that leave loading is not payable when an employee ceases employment and annual leave is paid out rather than taken as leave. Since its creation, leave loading has been designed to not be payable on termination of employment, unless an exception is provided for.

23. He is however clearly in error in claiming these amendments seek the abolition of leave loading. That is not the effect of the amendments, and leave loading will clearly remain in awards made under the *Fair Work Act 2009*, and will clearly be payable when employees use their leave during the course of employment, as it has been for decades.

24. Senator Bullock seems to have misunderstood the operation of the NES:

> *Finally, I turn to annual leave loading on termination. The national employment standards used to prescribe that leave loading was payable on termination. For that reason many awards did not prescribe that, because no award or agreement could be less than the national employment standards. To take that away now is unconscionable.*[11]

25. There is no NES on annual leave loading, and in fact the concept of leave loading only appears in the *Fair Work Act 2009* on one occasion as a mater than can be regulated in awards (s.139(1)(h)).

26. Senator Bullock's understanding of the history of leave loading and of the interaction of awards and the NES is also wrong. There is no basis to conclude that the current interaction of awards and the NES, which continues to cause significant ambiguity and problems, was intentional.

27. AMMA has searched the *Fair Work Bill 2008*[12] and its explanatory memorandum for all references to leave loading. They solely relate to what may be included in awards, indicating that the imposition of the NES was never expressly intended to change the longstanding, award based, application of annual leave loading.

28. The current problems arise because the NES on annual leave was poorly drafted and caused an unintended disruption to the long standing and universally accepted status quo on leave loading under awards. The amendments in Schedule 1, Part 1 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* simply restore certainty and maintain the long standing application of leave loading.

[10] Mr Champion, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3859)
[11] Senator Bullock, Second Reading speech: *Fair Work Amendment Bill 2014*, 16 September 2015, (Senate Hansard, 16 September 2015, p.7060)
[12] Which became the *Fair Work Act 2009*.

Where leave loading has been payable on termination, this will remain

29. The Explanatory Memorandum for the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* contains data on how leave loading operates under modern awards:

> *Of the current 122 modern awards, 113 contain an entitlement to annual leave loading. Around 17 per cent (or 19 modern awards) provide that annual leave loading is not paid on termination and around 68 per cent (77 modern awards) are silent on whether it is payable.*[13]

30. To the extent any award or agreement ever provided for the payment of leave loading on termination (which would be inconsistent with the basis on which leave loading was created) then such an entitlement would not be removed or diminished by the proposed amendments. If it was provided in an agreement, this would not be altered.

This is about awards and the NES, not agreements

31. Furthermore, the proposed amendments in Schedule 1, Part 1 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* clarify the statutory safety net in the National Employment Standards.

32. Nothing in previous experience with agreement making, including claims about some former AWAs[14], is in any way relevant to consideration of the proposition at hand. Debate on the 2014 Bill was littered with cheap and opportunistic references to Work Choices. This includes repeated references to an AWA at Spotlight stores which are now more than a decade out of date, and which refer to agreements abandoned by the company at least 8 years ago[15].

33. There is nothing in this Schedule 1, Part 1 of the 2015 Bill which can accurately be characterised as Work Choices or as AWAs, and it is disappointing to see serious propositions to improve the operation of the fair work system verballed in this manner.

34. It is difficult to escape the conclusion that some in the Opposition would reflexively label any workplace relations amendments introduced by a Coalition Government as Work Choices, regardless of their origin, purpose or intended effect.

[13] *Fair Work Amendment (Remaining 2014 Measures) Bill 2015,* Explanatory Memorandum, p.xxxiii
[14] Mr Champion, Second Reading speech: *Fair Work Amendment Bill 2014*, 26 August 2014, (House of Representatives Hansard, 15 May 2014, p.8636)
[15] http://www.smh.com.au/news/business/spotlight-turns-its-back-on-awas/2007/09/18/1189881473220.html

This is not about IFAs

35. A number of non-government speakers during debates in both the House and the Senate appear to have wrongly conflated two quite separate things; restoring the status quo on leave loading on termination, and what can be done under an IFA on leave loading.

36. Fixing the NES on how annual leave is paid out (Schedule 1, Part 1) is quite separate and servable from the proposed IFA changes (Schedule 1, Part 3). The extent to which an IFA might allow agreed flexibility in the use or application of leave loading is quite distinct from ensuring the NES do not create confusion or unintentionally operate inconsistently with long standing precedent.

37. It is quite possible for the Senate to pass Schedule 1, Part 1 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015,* and to not pass or pass with amendments, Part 3 (on IFAs).

There is no loss of entitlements

38. The ACTU claims that employee entitlements to leave loading will be lost of the amendments are passed[16]. Mr O'Connor, the Opposition Spokesperson on Workplace Relations goes further:

> *The government is also letting employers dip their hands into the pockets of workers by cutting their entitlement to the payout of annual leave loading on termination, money that Australians have been entitled to for years and years—40 or 50 years, in fact.*[17]

39. Schedule 1, Part 1 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* cannot legitimately be viewed as taking anything from employees or somehow removing entitlements. In the overwhelming majority of cases there has never traditionally been an entitlement to be paid out annual leave loading on termination of employment, and confusion only ever arose due to errors in drafting the 2009 package of Fair Work amendments.

40. In any exceptional cases where there may have been such an entitlement, this would be maintained following the proposed amendments. There is currently an anomaly and confusion created by a drafting accident, and this can and should legitimately be corrected to provide clarity and restore the status quo.

41. Mr O'Connor is wrong about annual leave loading being payable on termination of employment for "40 or 50 years". In reality, leave loading was never widely payable on termination of employment under awards as it has its genesis in projected shift loadings not payable on annual leave.

[16] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.7, ¶2.12
[17] Mr O'Connor, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3852)

42. The Fair Work Review Panel (appointed by Labor) also bells the cat on Mr O'Connor's claim, finding precisely the opposite; that employees did not have an entitlement to leave loading prior to the 2008/9 drafting errors.

43. Furthermore, in any situations where it has specifically been intended that employees be paid a leave loading on termination under an award or agreement, this would remain the case even after the amendments contained in Schedule 1, Part 1 of the Fair *Work Amendments (Remaining 2014 Measures) Bill 2015*.

44. It is also erroneous to describe leave loading as "accruing", which a number of Labor Senators and Members did during the course of debate[18]. It is annual leave which accrues and leave loading comes into play only as a definition of the rate at which such leave must be paid out. This is not a semantic point, there will be no loss of accrued entitlements were these amendments to be passed.

Employers will not refuse leave requests to save money[19]

45. Mr Lyons, then of the ACTU[20], claimed that employers would be encouraged by such amendments to deny employees annual leave to avoid paying the loading.

46. This does not stand up to scrutiny:

    a. If this were a valid concern, it would have been observable under awards for decades (which paid leave loading on leave taken during employment but not on termination of employment).

    b. This was not the case, annual leave has long been overwhelmingly used by agreement or as directed under the law. There are periodic disputes regarding when annual leave can or should be taken, but not as we understand it based on any employer attempts to avoid paying loading. We challenge anyone pushing this concern to come up with examples.

    c. The scenario the ACTU fears is also already regulated under the Act. Under s.88(2) of the *Fair Work Act 2009*, "*the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave*". It would be unreasonable to not allow an employee to take their accrued leave where the purpose was to deny them an entitlement they would otherwise be owed.

    d. The ACTU is trying to tag employers with a motivation which is precisely opposite of where their concerns actually lie. Delaying annual leave costs employers money, as it is taken at the wage level at the time it is taken. The main annual leave challenge for employers is ensuring employees actually use their annual leave (including loading) when it falls due, and that annual leave is not carried forward, unused, from year to year. This is

[18] Senator Cameron, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (Senate Hansard, 16 March 2015, p.1560)
[19] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.7, ¶2.13
[20] Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, Proof Committee Hansard, 14 May 2014, p. 1.

why employers seek capacity to direct employees to use some of their unused annual leave to keep unused leave levels down.

e. Employers regularly agree to employee requests to take unused leave prior to their actual resignation / termination date, upon which loading would be payable. This negates the point the ACTU is trying to make.

Employees will not be artificially encouraged to use their leave prior to resigning[21]

47. The ACTU also claims that the provisions will create an incentive for employees to use up their annual leave and then resign, somehow misleading their employers.

48. This does not stand up to scrutiny:

a. Employers generally have no problem with employees taking annual leave as and when it falls due, subject to request and agreement under company policies and consistent with the *Fair Work Act 2009*. If an employee subsequently resigns that is a matter for him or her.

b. Employees and employers already regularly agree to employees using up their annual leave prior to a termination date, and employees already strategically use up their leave then resign when it suits them, as is their right. Employees often gain perspective when taking a break and notify the employer on their return that they want to change jobs.

c. The *Fair Work Act 2009* regulates when an employee may seek to use their annual leave, and if there is a lawful right to use leave, it is difficult to see where any problem may lie.

49. Such claims from the ACTU are overwrought and baseless. Contrary to what unions argue, there will be no perverse outcomes from amendments that do no more than restore the long standing status quo.

50. We suggest that many of the arguments against this Part were motivated by a strategic decision that all elements of the 2014 Bill must be opposed, lest those reforms unions genuinely oppose stand any chance of passing.

Definition of leave payment does not disadvantage employees

51. Labor Senators on this Committee concluded the following on the comparable amendments in the 2014 Bill:

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

[21] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.8, ¶2.13

Labor Senators' view

1.32 Labor Senators agree that if the current requirement to pay at the full rate of pay were included in the Bill's proposed s 90(2) and the words relating to payment being calculated at the full rate of pay immediately before the date of termination, the provision would be acceptable.[22]

52. It is welcome that the Opposition Senators appear to accept the need to correct the existing anomaly on the payment of annual leave on termination of employment, and that s.90(2) of the *Fair Work Act 2009* must be amended.

53. To the extent this is what the Labor Senators were getting at, employers agree that the operation of the National Employment Standards should neither artificially advantage nor disadvantage employees compared to long standing practices and award precedent for the taking or paying out of annual leave.

54. However, where an employee does not actually work a shift or incur some form of 'disadvantage or hardship' that would trigger a loading or allowance, that loading or allowance should not be payable.

55. We invite Senators to recall that:

a. The amendment to s.90(2) reflects long standing industrial practice under the award system.

b. Termination of employment includes resignations at the instigation of the employee. In such scenarios the employee should of course be paid all that she or he is owed, however equally, it is not appropriate that the employer be forced to make payments which are conditional upon work having been performed where an employee choses to resign.

c. Nothing precludes a union and employer using an agreement under the *Fair Work Act 2009* to agree to some higher level of payment for unused annual leave on termination of employment.

How to proceed

56. The Committee should conclude that the amendments regarding payments for unused annual leave:

a. Give effect to specific remedial recommendations made by an expert, independent review of the operation of the *Fair Work Act 2009*.

b. Restore the long standing historical basis on which annual leave loading was created and operated under both awards and the pre-2009 statutory employment standards systems.

[22] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.37

c. Do not leave either employees or employers worse off, and simply correct what has proven to be essentially a drafting error that has created needless confusion and disputation.

d. Should be recommended for passage at the earliest possible opportunity.

SCH 1 – PART 2 – ANNUAL LEAVE & WORKERS COMP

57. Schedule 1, Part 2 of the Fair *Work Amendments (Remaining 2014 Measures) Bill 2015* would repeal s.130(2) of the *Fair Work Act 2009*.

58. This would have the following effect on the current provision:

> *FAIR WORK ACT 2009 - SECT 130*
>
> *Restriction on taking or accruing leave or absence while receiving workers' compensation*
>
> *(1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a compensation period) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a compensation law) of the Commonwealth, a State or a Territory that is about workers' compensation.*
>
> ~~*(2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.*~~
>
> *(3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.*

59. This would provide that "*an employee who is absent from work and in receipt of workers' compensation payments, will not be able to take or accrue annual leave under the FWA during the compensation period*".[23]

This was recommended by an independent, expert review

60. This gives effect to Recommendation 2 of Labor's Fair Work Review Panel:

> *The Panel recommends that s.130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.*[24]

61. The Fair Work Review Panel made this recommendation to redress an anomaly in the interaction of annual leave (under Commonwealth legislation) and state workers' compensation laws.

62. As set out in the Explanatory Memorandum "*the amendment ensures that all employees in the national system have the same entitlements in relation to the*

[23] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.9
[24] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.21

taking or accrual of leave during a period in which the employee is in receipt of workers' compensation".[25]

This will redress an unclear provision

63. The Fair Work Review Panel identified existing s.130(2) as an unclear provision that is causing difficulties and confusion.[26]

64. AMMA understands that outside Queensland and some Commonwealth coverage there is no entitlement for an employee on workers compensation to accrue annual leave, and a capacity to take annual leave only in Tasmania.[27]

65. The current confusion is costing employers money, including obtaining legal advice.[28] This led to the following Review Panel conclusion:

> *In the majority of the Panel's view this situation should be clarified by amending the FW Act to prevent employees accruing annual leave while receiving workers' compensation payments, despite what is written to the contrary in state or territory workers' compensation laws.*[29]

This will ensure workers' compensation operates as intended

66. The Opposition claims that employees will lose a capacity to take leave following the proposed amendment:

> *What else do we find in this bill? We find that, stashed away, there is a little sting in the tail for those on workers compensation, because the bill seeks to remove employees' ability to take annual leave while they are on workers compensation or awaiting the outcome of a workers compensation case. Now, that will put some people at a great deal of disadvantage. They will not be able to take their annual leave while they are waiting for their injury claims to be heard. Effectively, this will leave some people without income.*[30]

67. This seems an unsustainable claim given that the injured employees in Mr O'Connor's example would be in receipt of their workers' compensation payments as provided for under the relevant system.

This would be prospective

68. As the ACTU recognises:

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[25] *Fair Work Amendment (Remaining 2014 Measures) Bill 2015,* Explanatory Memorandum, p.viii
[26] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, pp.87-88
[27] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, pp.87-88
[28] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, pp.87-88
[29] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.88
[30] Mr Champion, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3857)

> *It is proposed that the amendment take effect the day after the Bill is given Royal Assent, to employees who commence a period of workers' compensation after that period.*[31]

69. Thus, no employee already on workers' compensation will see a change in their capacity to accrue or take annual leave.

Annual leave should accrue with service

70. During workers compensation the employee receives workers compensation payments, not salary or wages from the employer. Annual leave should accrue based on actual service with an employer, and when service is not being rendered for an extended period, no annual leave should be accrued.

71. A useful analogy is unpaid parental leave, during which an employee spends an extended period away from the workplace, not rendering service, but with a right to return to work. Employees do not (under the NES in the *Fair Work Act 2009*) accrue annual leave when on parental leave for example.[32]

72. Similarly with worker's compensation, the pay obligation has vested on someone other than the employer for a period, and no service is being rendered. Therefore no annual leave should accrue.

This will not exacerbate injury or illness

73. The ACTU claims that[33]:

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

[31] ACTU (2014) ACTU Submission to the Senate Committee on Education and Employment regarding the Fair Work Amendment Bill 2014, Submission #20, pp.6-9
[32] https://www.fairwork.gov.au/leave/maternity-and-parental-leave/when-on-parental-leave/other-leave-entitlements-during-parental-leave
[33] ACTU (2014) ACTU Submission to the Senate Committee on Education and Employment regarding the Fair Work Amendment Bill 2014, Submission #20, p.8

74. This ignores that fact that the majority of state and territory workers' compensation systems already do not allow employees to accrue annual leave whilst on workers' compensation.

75. The preceding also seems to assume that an employee can be unfit for work, but (in all cases) have capacity to take annual leave. It is difficult to understand how an employee can or should accrue annual leave whilst on workers' compensation, to then take a holiday from their workers' compensation.

76. The claim by the ACTU regarding the threat of 'overwork' is also misplaced. An employee on workers' compensation is not working. It may be no picnic recovering from a workplace injury or illness, but "overwork, stress and fatigue" do not come into play as claimed by the ACTU when someone isn't working.

77. The ACTU acknowledges that "*A period of recovery from an injury or illness is different to a period of rest and recreation away from work as a fit and healthy person*". It is therefore appropriate that there be a division between the two, clearly delineating annual leave from workers' compensation, as is the case in the majority of state and territory systems.

Queensland and the Commonwealth do not perform better

78. If the ACTU's claims were correct then the two jurisdictions where it is possible to accrue annual leave when on workers compensation (Queensland and the Commonwealth) would perform better on OHS. This does not seem to be the case[34]:

Rates of serious claims by jurisdiction, 2012–13p

Jurisdiction	Frequency rate (serious claims per million hours worked)	Incidence rate (serious claims per 1000 employees)
Tasmania	8.6	13.0
Queensland	8.2	13.9
South Australia	7.4	11.9
Seacare	7.4	32.1
Australian Capital Territory	7.3	11.7
New South Wales	6.9	11.7
Western Australia	6.1	10.6
Victoria	5.6	9.0
Northern Territory	5.2	9.4
Australian Government	3.4	6.2
Total	**6.7**	**11.1**

Source: Comparative Performance Monitoring Report, 16th Edition, Safe Work Australia.

[34] Safe Work Australia (2015) *Key Work Health and Safety Indicators, Australia, 2015,* p.9

Complications where an employee does not return

79. In a proportion of cases, an employee receiving workers' compensation never returns to the workplace, either leaving the workforce or pursuing alternative employment.

80. For an employer with an employee on long term leave, or away from the workplace unable to work, it is much clearer and more efficient to have the employee paid out all outstanding entitlements and not accruing new ones. This means paying out all entitlements as though the employee was leaving their employment.

81. This ensures that the often complex exercise of terminating the employment of an employee that will not return to work, is not further complicated by the calculation of leave and the need to make a payment to an employee that may not have been in receipt of any monies from the employer for some months or years.

82. Employees will also often seek to have any outstanding accruals paid to them when on period of extended leave, particularly where they face the 'step down' in payments after a certain number of weeks on workers' compensation payments.[35] This is often in the interests of both employer and employees.

How to proceed

83. The Committee should favour the approach recommended by the Fair Work Review Panel and pass Schedule 1, Part 2 of the Fair *Work Amendments (Remaining 2014 Measures) Bill 2015.*

[35] For example in Victoria an employee receives 95% of their pre-injury average weekly earnings for the first 13 weeks, and 80% thereafter. Source

SCH 1 – PART 3 – INDIVIDUAL FLEXIBILITY AGREEMENTS

84. AMMA's written submission to the Senate Education and Employment Legislation Committee inquiry into the *Fair Work Amendment Bill 2014* (Part B) indicated conditional support for these measures which were contained within Schedule 1, Part 4 of the Fair Work Amendment Bill 2014.[36]

85. Whilst AMMA continues to support these provisions we remain concerned that the Bill has not been amended to reduce the increased regulatory burden associated with "genuine needs" statements.

86. The Bill's provisions regarding IFAs are on the whole extremely positive and a step in the right direction for individual agreement making and workplace flexibility, albeit within IFA architecture.

87. AMMA indicated in its earlier submission that the individual flexibility agreement making system and statutory individual agreement making under the *Fair Work Act 2009* needed a more fundamental re-examination.

88. The need for greater individual flexibility is one of AMMA's six key priorities for workplace relations reform. To this end, the PC's inquiry into the *Fair Work Act 2009* provided an opportunity for the resource industry to outline its genuine concerns with the lack of individual agreement making options in Australia and to press for sensible changes to ensure the system provided for both collective and individual agreement making.

89. AMMA provided a primary submission and a further reply submission in response to the PC's draft report. AMMA commends those parts of these submissions which specifically address the resource sector's concerns with IFAs in greater detail.[37]

90. The following is a summary of AMMA's key concerns with the current framework governing IFAs which favour the reforms proposed in Part 3 of the 2015 Remaining Measures Bill.

91. It is also important that AMMA assists this Committee by constructively engaging with the concerns Members and Senators previously expressed have with the IFA Reforms (Schedule 1, Part 3 of the 2015 Bill). AMMA does not consider that the changes will have the effects previously opposing members and Senators claim.

Why the current IFA system needs repair

92. In AMMA's April 2012 submission to the General Manager of Fair Work Australia (now the Fair Work Commission) on the operation of the first three years of IFAs, AMMA pointed out that:

[36] AMMA (2015) Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment Bill 2014 (Submission #26), pp.38-42.
[37] AMMA Submission to the PC Inquiry, (March 2015) pp 76-92; AMMA Submission in Reply, (September 2015), pp 65 – 74.

a. The estimated take-up rate of IFAs in the resource industry was less than 5%.

b. Resource employers perceive IFAs in their current form as being of little or no value.

93. In May 2010, AMMA published a research paper called "*IFAs: The Great Illusion*", which indicated, *inter alia,* the following:

a. The mandatory inclusion of flexibility terms in enterprise agreements has not delivered genuine workplace flexibility because in many cases negotiating such terms with unions reduces them to mere tokens.

i This is a function of the strategy of a number of unions to insist on negotiating down scope for flexibility to only very marginal and limited matters.

b. To make IFAs more attractive to employers, the breadth of flexibility available under award and agreement flexibility clauses is crucial, as is reducing scope for unions to trivialise or render nominal flexibility through bargaining.

c. The "model" flexibility clause, while common in modern awards, is often not used in enterprise agreements.

d. The ability for an employee to unilaterally terminate an IFA with just 28 days' notice severely detracts from the utility and reliability of such arrangements for employers.

94. As AMMA's February 2012 submission to the Fair Work Act Review Panel highlighted, employers have found the flexibility clauses they are able to negotiate with unions under the Fair Work Act often only benefit some employees (if that) and offer little or no flexibility for the enterprise. We see a perverse scenario where neither employers not employees are particularly interested entering into IFAs.

What IFAs are not

95. A number of concerns raised during the previous Parliamentary debates on the 2014 Bill and in the Committee's previous report appear to be based on mischaracterising IFAs as akin to Work Choices era AWAs.

96. This is clearly wrong as the IFA concept is grounded in the parent instrument (either the modern award or the enterprise agreement). It is not a contract of employment which is given effect to by statute (i.e. former AWAs).

97. As the PC aptly stated:[38]

[38] PC draft report, p.599.

> *…unlike AWAs, which could be offered as an alternative to a collective agreement, an IFA stems from, and remains rooted in, the terms and conditions of the relevant award or enterprise agreement. This is because the IFA is made under an overarching 'flexibility term' that must be included in all awards or enterprise agreements. The IFA is taken to be a term of the enterprise agreement or award and takes effect as though it varies the award or enterprise agreement. The IFA does not change the effect of the award or enterprise agreement and is not a contract in its own right.*

Positive aspects of Schedule 1, Part 3

Division 3 – Scope of Flexibility

98. AMMA welcomes the Bill's broadening of the mandated level of flexibility under agreements.

99. As the Explanatory Memorandum to the Bill indicates[39], these "*amendments implement the Fair Work Review Panel's recommendation that section 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with the matters set out in paragraph 1(a) of the model flexibility term for enterprise agreements in Schedule 2.2 of the Fair Work Regulations, along with any additional matters agreed by the parties (recommendation 24)*".

100. These amendments would also implement the PC's draft recommendation 15.2:

> *"Australian Government should amend s. 203 of the Fair Work Act 2009 (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements."*[40]

101. It is relevant for the Committee to note that the PC in its draft report noted that "*there is evidence that the range of matters over which an IFA can be made sometimes gets whittled down during the bargaining process, with many flexibility terms in EAs allowing less flexibility that the model flexibility term set out in the Fair Work Regulations 2009*".[41]

102. The PC similarly noted that "*enterprise agreement negotiations often can and do act to reduce the scope for IFAs such that future employees and the employer are constrained in using them to improve workplace flexibility outside collective bargaining*".[42]

[39] Explanatory Memorandum, p.9.
[40] PC draft report, p.568.
[41] PC draft report, p.567.
[42] PC draft report, p.602.

Division 2 and Division 3 – Non-Monetary Benefits

103. AMMA also welcomes the Bill's inclusion of a legislative note that confirms that benefits that are not monetary may be taken into account for the purposes of determining whether an IFA results in an employee being better off overall than the employee would have been if no IFA was in place.

104. As the Explanatory Memorandum states, all the note does is provide clarity and certainty to employers and employee. However, and unlike the Fair Work Review Panel recommendation 9 which recommended a substantive legislative change to s.144(4)(c) and s.203(4), all the Bill does is simply insert a legislative note to alert the reader as to what is currently already permissible and lawful under the *Fair Work Act 2009* and remove any doubt for the employer and employee.

105. This measure will provide confidence to employers and employees and will likely result in the net take up of IFAs to introduce genuine flexibility for employees.

Division 2 and Division 3 - New Defence

106. AMMA welcomes the Bill's introduction of a defence for employers to an alleged breach of a flexibility term where the employer believes all requirements have been met in entering into the IFA. This gives effect to Review Panel Recommendation 11.

Division 2 and Division 3 – Minimum Termination Period

107. Division 2 and Division 3 of the Bill will create a new statutory requirement for IFAs which will allow unilateral termination of an IFA by either the employer or employee to be giving in writing and be no less than 13 weeks. The other amendment is to allow an employer and employee to agree to terminate the IFA at any time.

108. The PC's draft recommendation 16.1 also supported a default period of termination of 13 weeks:[43]

> *The Australian Government should amend the Fair Work Act 2009 (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.*

109. AMMA is supportive of the PC draft recommendation to extend the termination notice period to 12 months and considers this worthy of further consideration by the Parliament in the context of the current Bill. Longer prospective operation of an agreement between employer and employee maximises the likely utility and relevance of these arrangements.

[43] PC draft report, p.604.

Gender dimensions – Schedule 1, Part 3, Division 3

110. It is appropriate to add particular words of support for the amendments in Division 3 of Schedule 1, Part 3 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015.*

111. New s.203(2)(aa) would provide that an enterprise agreement regulating when work is performed, overtime, penalty rates, allowances and leave loading, it must:

> *…provide that the effect of those terms may be varied by an individual flexibility arrangement agreed to under the flexibility term*

112. AMMA has long been concerned at scope for collective agreements to limit the flexibility available to individual employees in agreeing when they work with their employer.

113. This is a particular issue for employees with family and caring responsibilities, and in particular for women working in often male dominated workplaces. It is not appropriate that a male majority in any workplace be able to make a collective decision to limit the flexibility available to all employees in that workplace, including women with family and caring responsibilities.

AMMA's Key concerns with Schedule 1, Part 3

Division 1 and Division 3 - Genuine needs statement

114. AMMA members' primary concern with the Bill's IFA amendments under Division 1 and Division 3 is the new requirement for all employers to ensure employees are provided with a "genuine needs statement" when entering into an IFA under a modern award or enterprise agreement.

115. Each employee would be required to provide a statement that the IFA leaves them better off than they would otherwise have been and detailing why the arrangement meets their genuine needs.

116. The Bill purports to merely formalise current requirements via a separate written record/instrument.

117. However, AMMA members are extremely concerned about how this requirement will operate in practice and that it will cause unintentional problems or reduce opportunities to enter into IFAs because of the increase in red-tape (notwithstanding other beneficial amendments).

118. This threatens to create such a level of complexity and administrative burden on businesses that it will dissuade them from using IFAs. It risks discouraging use of one of the few mechanisms under awards and agreements to access flexibility, e.g. for work-family balance.

119. Given that employees are not currently required to provide such a written statement, it seems onerous to apply such a requirement to future arrangements,

particularly given other, existing protections that require employers to ensure IFAs leave employees better off overall.

120. This proposal reflects an excess of caution and a deficiency of trust in the maturity and judgement of users of the system.

121. It also reflects a slightly paternalistic assumption regarding employees.

122. Employees should be able to agree flexibility and have the freedom to make such decisions protected. It is not necessary or practical to try to have employees attest that they are better off. They either agree or they do not, and the arrangement either meets the prescribed standards or it does not.

123. AMMA presumes this has been included in the Bill to protect employees who may be trading off monetary benefits for non-monetary benefits, which is explicitly allowed in the Bill. However, there are better ways to do this (*see below*).

124. Other problems with the requirement for a genuine needs statement:

a. Many employees will find the requirement to write a statement from scratch on those issues daunting and stressful.

i Employment law and individual agreement scares many people (something not assisted by the consistent fear-mongering of recent years in relation to individual flexibility and collective agreements).

ii Some employees may fear committing themselves to writing in relation to their terms and conditions of employment and assume they are altering their contractual terms or making a change they cannot reverse (which is not the case).

b. There may be particular concerns and reticence by employees for whom English is not their first language or for those with low literacy.

c. This may, for example, have the effect of discouraging someone who is illiterate from requesting flexibility which would be of assistance and benefit to them. Consider, for example, the burden of asking a recent migrant, whose first language is not English, to commit themselves to writing on why a particular arrangement meets their needs and will leave them better off.

d. In addition, the reason for the flexibility, and the perceived benefit to the employee, may be private. It is no business of the employer or the HR department whether someone is seeking flexibility to volunteer with a charity, deal with a family matter or to build model railways. A requirement to detail why the arrangement meets the employee's genuine needs risks stepping into the personal to an extent employers, let alone employees, will be uncomfortable with.

e. This requirement also thereby risks opening up a Pandora's Box of value judgements, personal considerations and allegations of discrimination.

f. Employers will also not want to be seen to be assisting workers with what to write, even if assistance is requested, as that could be perceived as a type of coercion.

g. Limiting the form to a tick the box pro forma that an employee then signs will make this task much less onerous than currently proposed in the Bill.

Proposed amendments to the Bill

Option 1

125. AMMA's preference would be for the requirement for a genuine needs statement to be removed from the Bill entirely, whilst of course retaining protections ensuring employees are left better off after entering into an IFA.

Option 2

126. Alternatively, the requirement to provide a genuine needs statement should only apply in relation to IFAs where a monetary benefit has been traded off for a non-monetary benefit.

127. In cases where the take-home pay stays the same or increases, there should be no need to provide a statement as there is very little risk employees would not be better off.

Option 3

128. Make the statement a pro-forma rather than requiring each employee to elucidate in writing why they believe they are better off.

129. Ideally, a single employee signature on a document stating that the IFA is agreed to and meets their genuine needs should be the only requirement.

How to proceed

130. AMMA supports passage of Schedule 1, Part 3, subject to the removal of requirements for a genuine needs statement (Option 1 above)

131. If the genuine needs statements are retained, Part 3 should be amended to:

a. Require a genuine needs statement only where a monetary benefit has been traded off for a non-monetary benefit (Option 2), and

b. Make the genuine needs statements a simple pro forma (Option 3).

SCH 1 – PART 4 – TRANSFER OF BUSINESS

132. Schedule 1, Part 4 of the Fair *Work Amendments (Remaining 2014 Measures) Bill 2015* would make various changes to the transfer of business provisions of the Fair Work Act 2009, principally in s.311 and 786AD of the legislation.

133. Again these amendments were quite specifically recommended by the Fair Work Review Panel, appointed by Labor.

134. Recommendation 38 from the Panel was:

> *The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.*[44]

135. This is what Schedule 1, Part 2 would do. Part B of this submission re-presents AMMA's previous submission on this issue which supports the proposed amendments, but which also identifies some changes to the Bill that AMMA argues would provide a superior approach in this area.

This is not a sleight of hand to encourage restructuring

136. The ACTU claimed to this Committee in its examination of the 2014 Bill:

> *An employer may restructure their operations with the sole purpose of avoiding their obligations under industrial instruments, and few employees would choose "no job" when their only other alternative was to keep their job on reduced conditions*.[45]

137. This was quite comprehensively rebutted in the initial inquiry, as this Committee's previous report notes:

> *2.66 The Department rebutted this claim, noting that the transfer was voluntary and that there were significant savings for employers when an employee elected to transfer on their own initiative:*
>
> > *As a general rule, where an employee transfers between employers that are associated entities, this will result in a transfer of business and the employee's industrial instrument will transfer with them to the new employer with the employee. This situation applies even where the transfer was initiated by the employee themselves. Under the current transfer of business rules in the Fair Work Act, the only way to stop an instrument transferring with an employee (including in these circumstances) is to seek an order to that effect from the Fair Work Commission. The Fair Work Act Review 2012*

[44] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.206
[45] Australian Council of Trade Unions, Submission 20, p. 27- Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.23

> *considered that removing the need for this process in relation to voluntary transfers between associated entities would reduce unnecessary expense to employers and employees and increase mobility opportunities for employees.*[46]
>
> *2.67 The Department noted significant savings would be made by removing the requirement of applications to the Fair Work Commission, noting the Regulation Impact Statements' calculation of savings for employers of up to $95, 112 per annum.*[47]
>
> *Committee view*
>
> *2.68 The Committee is not persuaded by evidence from submitters that the amendments in Part 6 are targeted to assist one particular company, but instead provide numerous options to many businesses and employees in Australia.*
>
> *2.69 The Committee accepts the evidence that where an employee applies to transfer between two associated business entities, they should be covered by the conditions in the new employer's enterprise agreement. The Committee does not agree that conditions imposed by the previous employer's agreement should apply to the employee when they have voluntarily transferred.*

This seems to have been rejected without debate

138. Debate on the 2014 Bill seems to have focussed on the various Parts regarding IFAs, Greenfields, and Union Entry. As we sifted through the Hansard online we found very few references to the amendments contained in Schedule 1, Part 6 of the 2014 Bill (Schedule 1, Part 4 of the 2015 Remaining Measures Bill), i.e. on transfer of business.

139. One of the few references that was made came from Senator Cameron:

> *Changes to the transfer of business provisions to reduce entitlements for workers should not be there. Why should we be agreeing to these things?*[48]

140. This is mere assertion and impossible to respond to. No reasons were provided for not accepting the amendments on transfer of business.

141. AMMA has therefore returned to the original submissions to this Committee's previous inquiry into the 2014 Bill to identify, address and rebut arguments against the transfer of business amendments.

[46] Department of Employment, Submission 14, pp 23-24 - - Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.23
[47] Department of Employment, Submission 14, pp 23-24 - - Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.23
[48] Senator Cameron, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 12 October 2015, p.7353)

This enjoys wide employer support

142. The ACTU sought to present this change as solely supported by, and by inference, initiated by, Qantas[49].

143. This is inaccurate. Employers in the resource industry also strongly support these amendments, as our previous submission (reproduced in Part B of this submission) makes clear. We also understand that various other employer representatives supported the previous iteration of these amendments.

144. Concerns about the existing transmission of business provisions of the *Fair Work Act 2009* are not a "narrow grievance" for a few employers but have the perverse effect of encouraging employers to not take on existing employees when contracts change, across a wide range of industries.

145. This is not an acceptable outcome in legislation which should support and encourage employment, and it can and should be remedied.

This is not "open to exploitation"

146. The ACTU[50] claims as follows:

> *An employer may restructure their operations with the sole purpose of avoiding their obligations under industrial instruments, and few employees would choose "no job" when their only other alternative was to keep their job on reduced conditions.*
>
> *… we submit that in many cases an employee will have no choice but to move to an associated entity of their current employer, for example when they are faced with the prospect of not having a job, as set out above, or for example when their current employer exerts some duress or coerces the employee to seek the transfer.*
>
> *…The risk to employees is too great to justify the removal of the current protections found in the Act.*

147. The CPSU claims that:

> *The amendments would also be open to exploitation. Recalcitrant employers could restructure their operations, offer employees the option of no job or a new job in a different corporate entity, and use that transfer to unilaterally reduce employees' wages and conditions.*[51]

[49] Australian Council of Trade Unions, Submission #20 to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Amendment Bill 2014 [Provisions], p.26 (Link)
[50] Australian Council of Trade Unions, Submission #20 to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Amendment Bill 2014 [Provisions], p.27 (Link)
[51] CPSU, Submission #2 to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Amendment Bill 2014 [Provisions], p.6 (Link)

148. Such claims are exaggerated and misrepresent both the status quo and the effect of passing the proposed amendments.

149. Employers want to be in a position to retain employees and where appropriate, employ them under the employers prevailing or applicable agreement or terms of employment.

150. Furthermore, claims of exploitation are misplaced as on both occasions, prior to a transfer and after, employment would need to exceed the safety net, comply with the National Employment Standards, and the terms of the incoming employer's collective agreement etc. Exploitation does not enter the frame.

Section 318 applications are onerous

151. The ACTU[52] claims that:

> *…The requirement to make an application under s 318 is not so administratively onerous as to justify the removal of the existing protections. An application under s 318 can be made by the transferring employee, or the new employer, or a union.*

152. This is directly contradicted by the Fair Work Panel:

> *The question for the Panel is whether it is necessary to require the parties to apply to FWA on every occasion an employee voluntarily seeks to transfer to a similar position in a related entity. We believe it would be preferable to spare both parties the time and expense of making such an application. This could be achieved by amending s. 311(6).*
>
> *Such an amendment is unlikely to increase the risks of employees having their terms and conditions of employment diminished through transfers to associated entities.*[53]

153. Employment legislation should make it easy, quick and cost effective as possible for employers to retain employees in employment, and the proposed amendments will better support work retention than the existing transmission provisions of the *Fair Work Act 2009*.

Views of employees

154. The ACTU claims that:

> *It is vital that the views of the transferring employee are taken into account. A determination of whether an employee has sought a transfer of their own free will should be determined by the Commission, as is currently the case. It should not be determined based on paperwork completed by the parties, or an assertion made by an employer.*

[52] Australian Council of Trade Unions, Submission #20 to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Amendment Bill 2014 [Provisions], p.27 (Link)
[53] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.206

It is necessary to examine the extent to which an employee has exercised their own choice free of any influence on the part of their employer or new employer.[54]

155. It seems axiomatic on the terms of proposed s.311(1A), that employees' views would be relevant and would be taken into account. The proposed term also refers to "the employee sought to become employed by the new employer, at the employee's initiative" (emphasis added), again dictating the employee's views would be relevant.

156. The objects of Part 3-4 of the *Fair Work Act 2009* will remain in the Act, and put the proposed amendment in context, particularly s.309(a).

The object of this Part is to provide a balance between:

(a) the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and

(b) the interests of employers in running their enterprises efficiently;

if there is a transfer of business from one employer to another employer.

The FWC retains its powers to make orders

157. The Committee can also be confident in passing these amendments bearing in mind Division 3 of Part 2-8 of the *Fair Work Act 2009*, which continues to empower the FWC to make orders on transfer of business.

158. The FWC can make a range of orders on agreement coverage for transferring employees which could be used to act on any concerns with transfer under the proposed new provisions. This nullifies the ACTU concerns.

Tighter drafting?

159. The Law Council expressed a concern with the drafting of the amendment:

Items 53–55: Transfer of business

17. Part 6 of the Act has provisions that ensure that an employee retains their enterprise agreement conditions of employment on a transfer of business.

18. Currently, pursuant to s 311(1), a transfer of business occurs where, within three months after the termination, an employee becomes employed by the new employer and the other requirements of the subsection are satisfied.

[54] Australian Council of Trade Unions, Submission #20 to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Amendment Bill 2014 [Provisions], p.27 (Link)

19. The Bill proposes to add a provision which states that there is not a transfer of business if, before the termination of the employee's employment:

> *the employee sought to become employed by the new employer at the employee's initiative.*

20. The Explanatory Memorandum to the Bill (the "EM") states that this is a change that is intended to only apply where an employee has sought an opportunity to advance their own career or for their own lifestyle reasons. That might be, for example, where the employee decides to move from one subsidiary of a corporate group (covered by one enterprise agreement) to take up a job offer with another subsidiary (covered by a different enterprise agreement). No concern is raised by that intent.

21. The EM goes on at [140] to state that it is "not intended" that the exception would apply where the move from one employer to another arose from an operational decision made by the employer, such as a decision to make the employee redundant.5

22. There is, however, nothing in the text of the Act (as against the EM) which states that the exception will not apply in a circumstance where an employee who has been told that they will be made redundant is invited, if they are interested, to apply for employment with the new employer, and does so.

23. The expression "at the employee's initiative" is wide enough and sufficiently ambiguous that it may be interpreted as contemplating any situation where the employee approaches a new employer. This might include a circumstance where the employee knows that their employment with their current employer is about to end.

24. If not amended, the Bill in its current form may well be interpreted in a manner contrary to the intent expressed in the EM at [140]. That is, in circumstances where an employee is about to be made redundant and told they can apply for a job with a new employer, there is a likelihood that such conduct will result in the employee not being able to retain their enterprise agreement conditions of employment, contrary to what is intended.

Recommendation:

25. It is recommended that the intention expressed in the Explanatory Memorandum at [140] be expressed clearly in the text of the Act.

160. AMMA considers that:

a. This is a concern with drafting not a substantive objection to what is proposed, and should be treated as such.

b. The concern identified by the Law Council, to the extent it were valid, should be able to be dealt with in extraneous materials (i.e. the Minister's final reading speeches on this Bill) and should not preclude passage of the Bill un-amended. The Minister could clarify how the provisions should be interpreted and operationalised as the Bills pass.

c. Failing this and were this concern to be considered valid, the Government and Senators should be able to agree to amend the Bill to address any such concerns. Such a concern should be able to be resolved by negotiation, and not preclude passage of important reforms in this area.

How to proceed

161. The current challenging economy and labour market is encouraging more takeovers, amalgamations and restructures, particularly in the resource industry. Entities are becoming associated in new combinations daily.

162. Our employment laws need to balance rights and entitlements with incentives to retain jobs. There is an opportunity to do much better on job retention in how the *Fair Work Act 2009* regulations transfer of business.

163. The Senate should:

a. Note the perverse and undesirable outcomes being driven by the existing transfer provisions of the *Fair Work Act 2009*.

b. Heed and give effect to the remedial measures specifically recommended by the Fair Work Review Panel.

c. Determine that properly examined, arguments against the proposed reforms in this area do not stack up and do not justify any refusal to pass the proposed transmission of business changes.

d. Consider the alternative approaches previously recommended by AMMA (see Part B).

e. Pass Schedule 1, Part 4 of the Fair Work Amendments (Remaining 2014 Measures) Bill 2015 expeditiously.

SCH 1 – PART 5 – RIGHT OF ENTRY

164. For resource employers, union entry into workplaces is the most significant and pressing of the amendments in the *Fair Work Amendment (Remaining 2104 Measures) Bill 2015*. It can be seen from Part B and Part C of this submission that AMMA sought to assist the Committee with considerable supporting input on the comparable schedule of the *Fair Work Amendment Bill 2014*.

165. Unions should be able to represent those employees who chose to associate with them, be their members and be represented by unions in bargaining. However, rules for entry into workplaces are always a balance between the interests of unions, union members, non-members and employers. This is made explicit in s.480 of the Fair Work Act, which was put in place by the former Labor government:

> *Object of this Part*
>
> *The object of this Part is to establish a framework for officials of organisations to enter premises that balances:*
>
> *(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:*
>
> *(i) this Act and fair work instruments; and*
>
> *(ii) State or Territory OHS laws; and*
>
> *(b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and*
>
> *(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.*

166. Powers for unions to legally force entry into premises owned or occupied by others have never been a free for all, nor have they been as absolute and untrammelled a "right" as some Senators and Members appear to believe.

167. There have long been rules governing union entry into workplaces, and Labor when in government ensured there were rules and procedures governing union entry into workplaces. The question posed by the 2015 Bill is whether the existing rules should be improved to better regulate this area in light of ongoing developments in workplaces.

168. Senator Lazarus expresses (in relation to the comparable schedule of the 2014 Bill) that:

> *I am deeply concerned that this will restrict and hamper unions from undertaking their important work of representing the rights and needs of workers in the workplace.*[55]

169. AMMA has sought to identify various claims that give rise to such concerns and to answer them. When the arguments advanced against the Bill are re-examined in detail and assessed against the facts (as we do this in this section), the Senate should be able to take comfort that this is not the case and that the proposed amendments can be passed without diminution of either union rights or their effectiveness in workplace representation, where sought by employees.

Unions will retain entry powers for both discussions & investigations

170. The ACTU has claimed to this Committee that the passage of the amendments (now numbered as) Schedule 1, Part 5 of *Fair Work Amendment (Remaining 2104 Measures) Bill 2015* will "practically prevent people from getting access to their union at work"[56].

171. This claim is a rank exaggeration that simply does not stand up to scrutiny. Union entry powers will remain in the Act after the proposed amendments, through Part 3-4, including the retention of:

a. Subdivision A--Entry to investigate suspected contravention

b. Subdivision AA--Entry to investigate suspected contravention relating to TCF award workers

c. Subdivision B--Entry to hold discussions, subject to amendments.

172. Senator Urquhart claims that:

> *…the government's inclusion of a provision that requires the Fair Work Commission to consider the 'combined impact on the employer's operations' is clearly intended to exclude all unions from a site if only one union has been found to have entered too frequently. This bill would make it harder, or even impossible, for workers to have discussions with their union representatives in their own time at work.*[57]

173. Senator Bilyk made remarkably similar claims:

> *The government has included a provision which requires the Fair Work Commission, when resolving disputes about the frequency of visits, to consider the combined impact on the employers' operations. This is clearly intended to exclude all unions from a site when only one union has been found to have entered too frequently. It punishes all unions for the actions of one.*[58]…

[55] Senator Lazarus, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.7054)
[56] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.26
[57] Senator Urquhart, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.1577)
[58] Senator Bilyk, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.1567)

It will create two classes of workers: those who can be visited at work by a union representative, and those who cannot. [59]

174. As did Mr Hayes in the House, "*if one union is found to enter the workplace too frequently all other unions can be excluded from the site. This is a clear attempt to banish the influence of unions from the workplace*".[60]

175. This appears to be a reference to Item 30 of Schedule 1, Part 5 of the Fair Work Amendment (Remaining 2015 Measures) Bill 2015, which would amend s.505A(6) relating to disputes on the frequency of union entry.

176. A number of points can be made on this:

a. Employers incur costs and disruption when unions chose to enter their worksites, including particular expenses for resource sites on which union officials must be closely chaperoned on an OHS basis. It is appropriate that there be some safety net to step in where visits become excessive.

b. Undue frequency of union visits is a real issue and some unions have conducted deliberate campaigns against employers by staging hundreds of site visits, on a daily or more than daily basis. The frequency of these visits exceeds any reasonable understanding of how often a union official would need to legitimately enter a workplace to meet with employees.

c. This was recognised in Labor's legislation, and existing s.505A of the Fair Work Act 2009 already provides that "*FWC may deal with a dispute about frequency of entry to hold discussions*".

d. If Union A is concerned that Union B is entering a workplace too frequently and may endanger its rights, it could bring its own dispute to the Commission to put some restrictions on the frequency of entry, or it could encourage or support the employer doing so.

e. The Opposition Senators concerns also appear to misread how the proposed provision would work. Proposed s.505A(6)(a) makes the lead consideration "fairness between the parties concerned", and this is balanced against the combined impact of union entries (ss.505A(6)(b) and (c)). Union A in the preceding example would be able to pursue an argument that it should retain entry rights as a matter of fairness and consistent with the purposes of Part 3-4 of the *Fair Work Act 2009*.

177. **Conclusion**: It is a complete exaggeration to claim that any employee will be denied access to a union official on the basis of these amendments. Rights to enter workplaces for both discussions and investigations will remain in the Fair Work Act.

[59] Senator Bilyk, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.1567)
[60] Mr Hayes, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3953)

178. These amendments absolutely do not remove right of entry and it ill serves the debate and a proper understanding of what is being proposed, to misrepresent them as doing so.

179. In fact, as Part B of this submission makes clear, resource employers do actually argue for an enterprise agreement to give unions exclusivity of access for discussion purposes, but the current Bill falls well short of what employers seek in this regard.

The investigations provisions are untouched

180. Critically, existing powers for unions to enter premises to investigate an actual complaint or concern (as opposed to trying to organise or sell membership) are not being amended in any way by Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2104 Measures) Bill 2015*.

181. Existing Subdivisions A and AA of Division 2, Part 3-4 of the Fair Work Act 2009 (ss.481-483) are not touched by these amendments. This means:

a. Existing powers to investigate alleged breaches or contraventions of the Act will remain in place without alteration.

b. Powers to investigate alleged breaches or contraventions of the Act will remain as Labor cast them under its 2009 Fair Work changes.

182. The proposed amendments in the 2015 Remaining Measures Bill also make no variation at all to powers of entry to investigate alleged OHS contraventions.

183. Many of Senators and Members statements in opposition to the Bill falsely conflate the two separate purposes for union entry (investigation and discussion). This is unfortunate and appears to have led Senators and Members to an exaggerated and erroneous understanding of what this Bill actually does on union entry powers.

It will not become harder to be represented by a union

184. In the previous Committee report, Opposition Senators concluded on the proposed amendments on union entry:

> *The amendments have the effect of making it harder for employees to access their union in the workplace, and therefore undermine freedom of association.*[61]

185. A number of Labor MPs seem to believe that these provisions will somehow preclude employees from joining a trade union altogether.[62] This is apparently on the basis that "We know that the conservatives do not like unions".[63]

[61] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.35
[62] Mr Giles, Second Reading speech: *Fair Work Amendment Bill 2014*, (House of Representatives Hansard, 15 May 2014, p.3890)
[63] Senator K Gallagher, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.6953)

186. Such claims are wildly exaggerated, and do not stand up to scrutiny.

187. The changes in Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* are important and will improve the right of entry provisions of the Fair Work Act, which have long been and will remain a delicate legislative balancing act between the interests of employees, unions and occupiers[64]. These amendments update an area of regulation that needs to be reviewed periodically to account for changing practices, developments and disputes, and will improve the balance between competing interests.

188. However:

a. The scope of changes being proposed is modest, and falls well short of that sought by employers (for example in submissions to Labor's Fair Work Review Panel, and more recently to the Productivity Commission).

b. Unions will retain entry powers, and retain them for both specific investigations and more general discussions (which includes organising and proselytising union membership).

c. Entry powers for investigations will not be touched (Subdivisions A and AA, Division 2, Part 3-4 of the Fair Work Act).

d. The Fair Work Commission will remain the ultimate arbiter of entry powers and will continue to be able to deal with any disputes that arise in relation to union entry.

e. Labor's rules for union entry will remain substantially in place following these amendments.

189. Ultimately when reviewing the bulk of Senators' and Members' references to union entry in second reading debate on this Bill it is difficult to escape the conclusion that concerns were either concocted or were based on a misreading of what is proposed. Unfortunately, it is also difficult to escape the conclusion this was all a bit of a beat up.

Employees have alternative sources of advice

190. Senator McKim claims that[65]:

> *In this bill we again see the obsession of the government—and again I make the point that it does not seem to matter whether it is the Abbott government or the Turnbull government here—about employees having access to their union representatives at reasonable times, and that, of course, remains something that we should fight to enshrine. In many workplaces often the only way workers can find out about what their entitlements are is by asking their union representative who can come in and tell them, 'No, actually there are laws to protect you, and you are*

[64] As s.480 of the Fair Work Act 2009 makes clear.
[65] Senator McKim, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.7144)

> *entitled to be paid properly as a member of the Australian community and as a member of the Australian workforce.' Yet what we see here in this legislation is a winding back of the provisions that would allow someone to come in and give that explanation.*
>
> …
>
> *When you think about this from the perspective of a vulnerable worker who may not, for example, have English as their first language, how are they going to find out about their rights? And the answer, of course, is that either they will not find out about their rights or it will be prohibitively difficult for them to find out about their rights. That will be the practicality of this legislation, and I and the Greens have no doubt that that is exactly what this legislation is designed to do.*

191. This ignores the substantial advisory, recovery and enforcement services offered by the Workplace Ombudsman, and the substantial efforts of the Ombudsman to offer assistance and advice in languages other than English.

192. The Senator also ignores the fact that union entry powers will remain in the legislation after the passage of the proposed amendments, and that unions will be able to continue to play the investigatory role he describes.

193. We would also note that in relation to a key group of employees who often speak languages other than English, that the investigatory powers for TCF outworkers are not touched in any way by these amendments.

A union will not need an enterprise agreement for entry

194. Various second reading speeches in the Senate, including that of Senator Ludwig[66] seem to suggest that a union will require an enterprise agreement to exercise entry powers onto worksites.

195. This is patently untrue. Proposed new s.484, unambiguously contains two clear options or avenues for union entry:

a. Proposed s.484(1) which applies to situations in which a "Permit holder's organisation is covered by an enterprise agreement", and

b. Proposed s.484(2) which applies to situations in which a "Permit holder's organisation is not covered by an enterprise agreement".

196. There will therefore be entry options for unions that are covered by an enterprise agreement applicable to the workplace, and entry options for unions not covered by an agreement applicable to the workplace.

197. Again, the Bill actually falls short of what AMMA argues for, and resource employers would like to see an agreement with one union (or indeed with employees without union involvement) comprehensively exclude entry powers

[66] Senator Ludwig, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.6153)

for other unions. This is not however what the 2015 Remaining Measures Bill does, and the Bill falls short of employer priorities for reform in this area.

Unions can still take a dispute to the FWC on entry powers

198. The passage of the proposed amendments will not remove capacity for unions to ensure they have access to their members for discussions and to investigate suspected contraventions of the *Fair Work Act 2009*.

199. If unions are concerned that an employer's actions are limiting access to their members or potential members, or that employers are manipulating how entry occurs or where they can meet with employees, they will still be able to take a dispute to the FWC under s.505 of the *Fair Work Act 2009*.

Labor did not negotiate its changes when in government

200. Speaking on the 2014 Bill, the Member for Morton, Mr Perrett claimed that:

> *Our reforms ensured that workers could raise issues with union representatives in workplaces, giving them access to broader rights to flexible work arrangements, and to protect workers from arbitrary rostering changes, which are a big problem generally. The changes came from a long period of consultation that employers were involved in, a consultation in which the Labor government made concessions to their point of view—it was about balance.*[67]

201. There was substantial "consultation" on the 2009 changes in terms of time spent, and they were worked through in detail to explain the intended effect and for input on the execution of Rudd/Gillard government policy.

202. There are restrictions on what can be said about these discussions, however it is not the view of employer participants that there were many meaningful concessions or movements from the then government. As a result of not paying sufficient heed to employers Labor needed to rapidly convene an independent review, the Fair Work Review Panel to identify solutions to substantial problems with its showpiece workplace relations legislation.

The Opposition is stuck in the past on right of entry

203. Many Opposition Members and Senators are former union officials and used debate on this Bill to recall their experiences 'on the job' entering workplaces to speak with employees. Three points stood out in reading these contributions:

    a. The ex-union officials appeared to be able to do their jobs quite well under the pre-Fair Work version of right of entry, which this Bill would essentially restore. There seems a strong tenor of "I got the job done" using the previous right of entry laws, but that younger union officials today need an artificial leg up.

[67] Mr Perret, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3849)

b. This seems particularly true of the story told by Senator A Gallagher, who seems to have been able to manage his previous job without any recourse to a statutory right of entry.[68]

c. Opposition Members and Senators seem to have a 'frozen in time' understanding of workplaces, which is often pre-internet, pre-email and pre-social media. They are applying their ageing experiences and assumptions to contemporary workplaces and employees, 89%[69] of whom (in the private sector) are choosing not to join trade unions.

204. We were particularly interested in this contribution from Senator Bullock:

> *I was an official of the union for 37 years—I did use my right of entry. In the 1970s I used to amuse myself by reading the Sunday papers in New South Wales and identifying those shops trading illegally and paying them a visit. I paid a visit to a furniture shop in the Bankstown area. I went in and showed my right of entry and asked if I could inspect their shop registration certificate. The proprietor had an interesting way of dealing with visiting union officials. He went behind the counter and got out an axe—not a tomahawk; an axe. He followed me, briskly, out of the shop waving his axe. Happily outside the door of the shop there was a public phone booth. In those days mobile phones were restricted to Maxwell Smart. I got on the phone and rang the police, and the police attended. I said, 'Here I am; I am a union official and here is my right-of-entry certificate. I had been into that shop to ask to see a copy of his shop registration and he chased me out of the shop with an axe.' The policeman said, 'Leave here immediately or I will arrest you for trespass.' Right-of-entry certificates do not do you a whole lot of good but, nevertheless, right of entry is critically important.*[70]

205. 1970s industrial relations war stories are very nostalgic and amusing, but they come from very different times, and are not germane to how we approach union entry into contemporary workplaces, employing very different employees, in a very different society.

206. Contemporary union officials are used to operating in an environment where entry, and conduct on entry is closely scrutinised, and they are familiar with the need to follow detailed statutory obligations. At issue here is whether these rules are correctly balanced and up to date, not a return to the good or bad old days, of less regulation of union entry to workplaces (depending on one's perspective).

[68] Senator A Galagher, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.7049)
[69] ABS (2015) 6333.0 - Characteristics of Employment, Australia, August 2014
[70] Senator Bullock, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 16 March 2015, p.7055)

How to Proceed

207. AMMA supports passage of the proposed amendments to union entry powers under the *Fair Work Act 2009*. However, as set out in Part B, AMMA also supports amending Schedule 1, Part 5 to:

a. Require a union to be covered by an enterprise agreement onsite to gain right of entry for discussion purposes.

b. Preclude a union exercising right of entry for discussion purposes to a workplace that is covered by an agreement with another union or unions.

c. Enable invitation certificates to only be used to gain entry on non-agreement covered sites.

d. Provide appropriate safeguards on the role and operation of invitation certificates for union entry, as set out above.

208. AMMA also supports:

a. Remedial changes to union entry, either as AMMA recommends, or alternatively as set out in Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*, commencing as soon as possible.

b. Additional requirements for union officials to carry photo ID.

c. Amending the Fair Work Act to talk about "union entry" not "right of entry".

SCH 1 – PART 5 – RIGHT OF ENTRY (LOCATIONS)

209. AMMA, on behalf of Australia's resource employers:

a. Strongly supports Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* that will:

i Repeal amendments made by the *Fair Work Amendment Act 2013* that require an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations.

ii Repeal amendments made by the *Fair Work Amendment Act 2013* relating to the default location of interviews and discussions and reinstating pre-existing rules.

b. Represents the primary cohort of employers targeted in the requirement to provide transport and accommodation for remote locations, and employers significantly impacted on by the default "lunch room" provisions.

c. Has strongly and consistently opposed the imposition of these requirements, and then strongly and consistently supported their removal in favour of restoring the preceding status quo on the location of discussions, including supporting the passage of then Schedule 1, Part 8 of the Fair Work Amendment Bill 2014.

210. Various arguments were advanced against the comparable provisions of the 2014 Bill, none of which stand up to scrutiny and none of which should lead the Senate to not pass these amendments.

211. **We urge the Committee to look at these points in conjunction with:**

a. **Part B, which reproduces AMMA's arguments in support of identical amendments in the Fair Work Amendment Bill 2014**.

b. **Part C, which reproduces AMMA's input to the Australian government's recent Post Implementation Review of the default lunch room and transport provisions of the Fair Work Act**.

This reverses only very recent changes to union entry powers

212. As AMMA has pointed out, the primary changes proposed to union entry would:

a. Reverse very recent changes to union entry powers gifted to unions in the final months of the previous Rudd/Gillard government.

b. Restore the long standing, widely accepted, balanced, pre 1 January 2014 status quo.

213. Labor's 2013 changes to union entry powers did not right any wrongs, and in fact deliberately wrought mischief and created problems in the operation of previously well balanced and efficiently operating rules on union entry.

214. The Senate has an opportunity to consider resulting experience and put this right.

Employers and unions can (and should) agree on discussions and arrangements for remote locations

215. As the Ai Group notes:

> *The provisions in the FW Act remove any incentive for the permit holder and the organisation of which the permit holder is an official to negotiate a sensible accommodation and/transport arrangement which suits all parties, including the employer.*[71]

216. It is appropriate that the *Fair Work Act 2009* provide incentives for employers and unions to work out entry arrangements for themselves, without recourse to the Fair Work Act. Experience shows that this can be achieved, but the process can be derailed not only through poor union or employer conduct, but also through unduly prescriptive attempts to bolter entry rights that replace cooperation and negotiation with rule bound behaviours. The majority in this Committee's previous consideration of these reforms seems to have captured this point:

> *The Committee agrees it is not appropriate that permit holders are not given an incentive to negotiate transportation and accommodation requirements, where appropriate.*[72]

The FWC will determine what is reasonable

217. Opposition to the Bill included this from Ms Hall:

> *Union officials will have to comply with 'a reasonable request' by an employer to hold discussions in 'a particular room'. Reasonable request? Who determines what reasonable is? Particular room? Even a particular room can be very intimidating. Employees will be prevented from nominating locations and employers will nominate locations that will intimidate, as I stated.*[73]

218. And this from the Greens:

> *We know that what some unscrupulous employers do at the moment or have done in the past is to say, 'Sure, you—a low-paid worker—can find out what your minimum legal rights are. But I will tell you what I will do: I will put the union representative, when they come during your lunch break, in the room next to my office and I will just sit there with a clipboard*

[71] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.27
[72] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.27
[73] Ms Hall, Second Reading speech: *Fair Work Amendment Bill 2014*, (House of Representatives Hansard, 15 May 2014, p.8607)

> *making a note of every worker who comes in to get advice about what their minimum conditions are.' We know what that can lead to.*[74]

219. Who will determine what is reasonable? It will be the FWC where there are any problems, as it has traditionally been. Where an employer seeks to game the system or to intimidate or preclude unions having appropriate discussions with their members, a dispute can be taken to the FWC under s.480 of the *Fair Work Act 2009* and remedial orders can be made.

220. The existence of ultimate determination by the FWC should give Senators comfort that they can and should pass the proposed amendments on the location of discussions between a union official exercising entry powers and interested employees.

Further Green Concerns

221. Mr Bandt provided a long set of reasons for his opposition to these amendment in the House:

> *We have also seen this obsession from the government about employees having access to their union representatives at reasonable times. I can tell you stories of workers in sweatshops—making the clothes that those of us in the chamber here today will be wearing—who are working on less than minimum conditions and would dearly love to know what those minimum conditions are. Often the only way that they will find out about them is from a union representative who comes in and tells them, 'No, actually there are laws and you are entitled to be paid properly as a member of the Australian community.' Yet, what we see here in the legislation is a winding back of those provisions that allow someone to come in and give that explanation. What we know—because I have seen it happen—is that what some unscrupulous employers do at the moment, or have been doing in the past, is say, 'Sure, you, low-paid worker, can find out about what your minimum legal rights are, but I tell you what I'll do: I'll put the union representative, when they come during your lunch break, in a room next to my office and I'll just sit there with a clipboard making a note of every worker who comes in to get advice about what their minimum conditions are.' Currently, the legislation says that you cannot do that. You must strike the right balance between not disrupting the workplace and allowing people to find out what their minimum entitlements are. That goes under this legislation. When you think about this from the perspective of a vulnerable worker who may not have English as their first language, how are they going to find out about their rights? They just will not. That will be the practicality of it. That is exactly what this legislation is designed to do.'*[75]

222. In response:

[74] Senator Seiwert, Second Reading speech: *Fair Work Amendment Bill 2014*, (Senate Hansard, 12 October 2015, p.7256)
[75] Mr Bandt, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3863)

a. No change is proposed to union entry powers to investigate breaches, in either workplaces generally, or for TCF outworkers specifically. Whilst a very legitimate concern generally, this is simply not relevant to the specific amendments actually before the Senate.

b. If a union feels the proposed location for their discussions with employees is unfair or prejudicial, they can dispute this with the FWC, which has the power to direct the location where discussions occur.

c. The scenario Mr Bandt sketches may also sail dangerously close to adverse action which is and will remain clearly prohibited and actionable under the *Fair Work Act 2009*.

d. Mr Bandt ignores the substantial assistance and information the Fair Work Ombudsman provides in languages other than English.

223. Properly deconstructed, arguments advanced against these reforms do not stand up to scrutiny.

SCH 1 – PART 5 – RIGHT OF ENTRY (INVITATIONS)

224. A number of Senators and Members who expressed opposition to the amendments regarding union entry focussed on the proposed invitation certificate process (Schedule 1, Part 5 of the 2015 Bill, Items 31-35).

This is not a significant departure from the status quo

225. Various comments opposing these amendments exaggerate how much of a departure from the status quo the invitation certificate process would represent.

226. **Something comparable is already in the Fair Work Act**: Existing provisions empowering union entry to investigate contraventions of the Fair Work Act / workplace rights already contain a process for "*affected member certificates*" (s.481 of the *Fair Work Act 2009*).

227. This means:

a. The Fair Work Commission (FWC) is already issuing certificates under s.520 of the Act 'proving' that unions are seeking entry to assist individuals in relation to alleged contraventions of the Act.

b. The FWC is already dealing with processes to simultaneously link entry to genuine concerns, and protect the identity of individuals (see s.520(3)).

c. Proposed Subdivision DA of Part 3-4 of the *Fair Work Act 2009*[76] builds on existing concepts, inserted into the Act by Labor when in government.

228. **This reflects long standing practices**: In an unorganised workplace (without any substantial plurality of union members) that is coming to the attention of unions for the first time, there will almost always be employee with some grievance or concern who is bringing that concern to the union's attention and seeking the union's assistance onsite.

229. Put simply, there is almost always a complainant who calls in the union. It was ever thus, and it has always taken an employee with a grievance to bring their workplaces to the attention of trade unions.

230. And unions have always expressed concerns that the complainant or whistle blower who brings in the union will be subject to retribution.

231. However critically for the current questions before the Senate, Invitation Certificates will not change this long standing and unavoidable part of how our workplace relations system works.

[76] Item 31, Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*

232. **Employees are protected**: As noted below, employers are already clearly precluded from any retaliatory action against an employee they think invited the union into the workplace.

Most union entry will not require invitation certificates

233. In most situations where a union has a long standing or established relationship to an enterprise, entry will not rely on invitation certificates, but on the union being covered by an agreement with the employer.

234. The invitation certificates will apply only where the union is not a party to an enterprise agreement (where the union is covered by an enterprise agreement, s.484 will apply) or where an employer does not agree to the union's entry (which Opposition Senators correctly note happens on many if not most occasions).

Union entry has never been a free for all at unions' discretion

235. Union entry has never been a free for all, or entirely at any union's discretion. That has never been the 'right' in right of entry, either domestically or internationally.

236. The objects of Part of the *Fair Work Act 2009,* s.480, make clear that the right of entry provisions seek to balance three things:

a. The right of unions to represent their members and hold discussions with potential members.

b. The right of employees to receive information and representation from unions.

c. The right of occupiers of premises and employers to go about their business without undue inconvenience.

237. The ACTU has expressed concern that the proposed amendments in Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* "*sets in place, for the first time, an arrangement where workers essentially have to physically invite the union in in order for them to get on site, with all of the difficulties that will pertain, including requiring people to take steps to positively invite the union*".[77]

238. Yes, invitation certificates will become a requirement for entry where a union is not party to an enterprise agreement with an employer, but they will simply form part of a series of obligations.

239. An invitation certificate will perform a very serious and crucial function, namely ensuring that where a union purports to enter a workplace to inform and represent employees that it is actually entering for this purpose.

[77] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.26

240. It ensures that employees actually wish to participate in discussions with unions and wish them to enter the workplace. It is legitimate to ask for proof, and invitation certificates provide proof.

Clarifying the role of invitation certificates

241. Opposition Senators made the following observation in their conclusions on the previous iteration of these amendments:

> *No provision actually requires that an employer or occupier take notice of an Invitation Certificate.*[78]

242. We are really not sure what point is being advanced here. The intent of proposed s.484(2)(e) is that the invitation certificates are evidence that an employee has "*has invited the organisation (union) to send a representative to the premises for the purposes of holding () discussions*".

243. If an employer fails to take notice of an invitation certificate, and denies a union official entry to their premises, he or she would not only be ignoring an official notice endorsed by the FWC, but they would be subject to prosecution for breaching the *Fair Work Act 2009*.

The Commission should oversee/administer invitation certificates

244. Labor Senators made the following observation in their conclusions on the previous iteration of these amendments:

> *This will enable the union to obtain a certificate from the Commission to the effect that the Commission is satisfied that there is a member or prospective member that the union is entitled to represent who has invited the union to send a representative on site for the purposes of holding discussions.*[79]

245. Again, we are not sure what the concern is or we are supposed to conclude from the point being emphasised.

246. Properly understood:

a. The right of a union to an Invitation Certificate is automatic under these amendments, hence the use of the word "must" in proposed s.520A(1), directing the FWC to issue invitation certificates to unions .

b. Where the prospective member invites the union to send a representative for discussions, the union can secure an invitation certificate (See proposed s.520A).

[78] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.35, ¶122
[79] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.35 – emphasis added by Labor Senators in the June 2014 Report.

c. With the invitation certificate, the right of the union to enter for discussions is unambiguous.

d. Existing s.520 provides for the analogous process under which the FWC must issue "Affected member certificates" – and this process was introduced by Labor when in government.

The Commission will avoid delays

247. During second reading debates on Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2104 Measures) Bill 2015,* the Opposition Spokesperson on Workplace Relations, Mr O'Connor claimed that:

> *Additionally, there are no provisions for the commission to deal with an application within an appropriate time frame, so entry for the purposes of holding discussions with employees about an immediate workplace issue can be unduly delayed and allow sufficient time for the issue or problem to be hidden.*[80]

248. With respect, that is not how we read proposed s.510A, noting the direction that the FCW "must" issue invitation certificates "on application by an organisation". We see no scope for undue prevarication or delay.

249. The Fair Work Commission has good processes for listing matters as expeditiously as they warrant, and is well versed with situations in which unions seek to enter the workplace and the urgency of action in this area. The FWC well understands the problems created where entry matters are not resolved quickly – it sees the resulting disputes.

250. The FWC also works with peak organisations of unions and employers on its internal processes and client services. These discussions would allow unions, through the ACTU to ensure the process for invitation certificates works efficiently and in a timely manner.

251. However, if this concern is critical to the Opposition and not just a throw-away line, and if resolving this concern would help the Opposition be in a position to pass the amendments, it should be addressed.

252. If a small addition to proposed s.520A to direct the FWC to examine and issue invitation certificates as expeditiously as possible would assist the passage of these amendments, it would not be opposed.

Invitation certificate processes will be clearly explained, including to employees from NESB backgrounds

253. Ms Bourke, made the following contribution to debate on the comparable provisions of the 2014 Bill:

[80] Mr O'Connor, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3844)

> *It opens the door to exploitation of vulnerable people, such as recent migrants, who in the real workplace of Australia will now be expected to know immediately that they need to ask their employer if they can invite the union into their workplace. How ridiculous! You are having a dispute or a misunderstanding with your employer. You are scared and vulnerable enough, and you have got to go to your employer and say, 'Can I invite the union in?' It just belittles. It has no understanding of how unions work, how collectivism works and what is needed to protect people in their workplaces.*

254. No employee is going to seek an invitation certificate without the involvement of a trade union, and without being able to interact with the union organiser either in English or another language. Again, this is no different to the existing situation, and where aggrieved employees bring concerns to a union's attention, they are going to need to communicate with the union and seek the union's aid.

255. Such a concern also ignores the substantial assistance the FWC and the Workplace Ombudsman provide in languages other than English, including according to its website in "*Arabic, Chinese (simplified and traditional), Greek, Indonesian, Spanish and Vietnamese*"[81]. There is also the TIS, Translating and Interpretation Service.

256. Again, this is an implementation matter not a reasonable objection to the substance of what is being proposed, and the ACTU have avenues to raise this with the Commission in its implementation of the new invitation certificate process if it proves a real issue.

If TCF outworkers are a concern, exempt them

257. If there are any particular concerns for TCF outworkers, they should be dealt with separately, as is already the case in relation to entry to investigate suspected contraventions of the *Fair Work Act 2009* (See Subdivision AA of Division 1, Part 3-4 of the Fair Work Act).

258. If exempting the workplaces of TCF outworkers from the new union entry provisions, or providing a bespoke arrangement for this unique area of employment would assist in the passage of Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2104 Measures) Bill 2015,* this would not be opposed.

Anonymity in small workplaces

259. Mr Marles expressed concerns about anonymity:

> *But I do not think anyone can seriously suggest that a proposition of an invitation certificate could realistically remain anonymous in circumstances where you have a small workplace. If you are talking about 15 or 20 employees, a union turns up by virtue of the issuing of an invitation certificate, it would be very difficult to maintain any anonymity*

[81] https://www.fwc.gov.au/about-us/resources/resources-other-languages

> *around the person who gave rise to that certificate. Therefore, as a proposition, we see that as being unrealistic and therefore one which would mean that the ability for individuals in those circumstances to be able to consult with a union would be seriously curtailed.*[82]

260. What Mr Marles ignores is that in small workplaces, when the union turns up under the existing entry rules, an employer is already going to be able to guess who invited them in. This has always been the case and does not change in any way through the invitation certificate process.

261. There is nothing in the proposed invitation certificate process (proposed s.520A) that will make an employer any better or worse informed as to who invited the union into the workplace.

262. The only clear, knowable fact in such scenarios is that a union seeks to enter the workplace for discussions and may raise concerns with the employer, and this will remain the case after the amendments.

263. Retribution against employees will clearly remain prohibited. We urge Senators to recall the clear prohibitions on an employer taking any adverse action against an employee for seeking union representation and assistance, and that these will remain in place after the proposed amendments.

Invitation certificates need an expiry date

264. In their conclusions on the last iteration of these amendments, Labor Senators raised the concern that:

> *Such certificates, however, will have expiry dates which will be constrained by as yet unpublished regulations.*[83]

265. Of course the certificates need an expiry date. The purpose of the certificate is to evidence than an employee of the enterprise wishes the union to attend the workplace to address their, and their workmates, concerns.

266. As a matter of logic, these certificates cannot be indefinite, as the employee may leave, the concerns may be alleviated, the management may change, or the employer may make an agreement with another union.

267. If the Opposition has a specific minimum period it believes such certificates should last for without being required to be secured again, and this would aid passage of the amendments, this should be identified and raised with the government in discussions towards passing the Bill.

268. Note: Australia does not have the US system in which an election of union representation lasts in perpetuity or until overturned. Representation in Australia requires some continuous renewal of mandate, and these amendments reflect that.

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[82] Mr Marles, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.8613)
[83] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.35

Privacy and identity are protected when making invitations

269. The ACTU has expressed concern that invitation certificates will be required in situations in which employees may be in "*circumstance of some considerable fear*".[84]

270. Labor Senators also supported the submission by the CPSU which claimed that:

> *Some employers will use these amendments to unreasonably delay entry by a union. The requirement that a union be invited in by a member or potential member also creates the capacity for implicit and/or explicit intimidation of the workforce.*[85]

271. In debates on this Part of the Bill, Mr Hayes stated that:

> *If someone calls a union official into the workplace that person can be identified and that could lend itself to other forms of vilification—probably not from the trade union movement but maybe from the employer.*[86]

272. A series of points can be made against this:

a. Employees calling a union official into their workplace can always be subject to vilification by under-informed or poorly minded employers, nothing in any law will change that where an employer is poorly motivated and/or poorly informed as to employee rights.

b. Employers will always have their suspicions as to which employees 'called the union in'; nothing in the proposed amendments changes that.

c. The provisions have been drafted to protect the identity of employees inviting the union under proposed s.502A(1)(c).

d. There are substantial protections against employers vilifying or damaging employees in their employment for the reasons of the employee seeking to exercise their representational rights – they were there before these amendments, and they will protect employees after these amendments.

273. If Opposition or cross bench Senators have ideas on how to even better protect the identities of inviting employees they should bring these to the government to facilitate passage of the amendments.

How to Proceed

274. The above points are disparate and disconnected, because the objections raised against these provisions in the Senate and House debates were disparate and disconnected.

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[84] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.26
[85] Community and Public Sector Union (CPSU), Senate Education and Employment Legislation Committee inquiry into the Fair Work Amendment Bill 2014, Submission 2, p. 3.
[86] Mr Hayes, Second Reading speech: *Fair Work Amendment Bill 2014*, 15 May 2014, (House of Representatives Hansard, 15 May 2014, p.3953)

275. One could almost suspect decisions are taken to oppose the amendments first, and then a search was made for arguments to back up this position afterwards, *ex post facto*.

276. The arguments we could find against the right of entry changes, and the invitation certificates in particular, are eminently rebuttable, and do not stand up to any scrutiny.

277. We have answered them above, and the Senate is entitled to conclude that on any fair examination of how the provisions will actually work and the objections made against them, Schedule 1, Part 5 of the *Fair Work Amendment (Remaining 2104 Measures) Bill 2015* should be passed expeditiously.

SCH 1 – PART 6 – FWC HEARINGS & CONFERENCES

278. As set out in the Explanatory Memorandum:

> *128. Part 6 of Schedule 1 amends Part 3-2 of the Fair Work Act which deals with unfair dismissal. The amendments commence the day after Royal Assent and provide that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference, when determining whether to dismiss an unfair dismissal application under section 399A or section 587. The amendments in this Part implement Fair Work Review Panel recommendation 43.*[87]

279. Part B of this submission contains AMMA's previous submission in support of such amendments, a position which resource employers maintain.

This was recommended by an independent, expert review

280. Labor's hand-picked Fair Work Review Panel, specifically notes that Labor's *Forward With Fairness* Policy sought fewer hearings and less formality in dismissal matters.[88] The Panel found that:

> *…it does seem that there may be room to improve how flexibly* [termination of employment] *claims are dealt with to better meet the objects of the provisions.*[89]

281. The Fair Work Review Panel specifically recommended the changes contained in Schedule 1, Part 6 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015:*

> *The Panel recommends that the FW Act be amended to provide that FWA is not required to hold a hearing when exercising powers to dismiss an application under s. 587, nor when exercising the recommended powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWA direction or order. In each of those circumstances, FWA must be required to invite the applicant and the employer to provide further information before making a decision to dismiss the application or not.*[90]

Existing FWC flexibility is not prejudicial or unfair

282. The trend in recent years has been towards the FWC having more discretion in how dismissal claims are dealt with. This followed Labor's 2007 *Forward With Fairness* policy and its implementation in the *Fair Work Act 2009*.

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[87] *Fair Work Amendment (Remaining 2014 Measures) Bill* 2015, Explanatory Memorandum, p.21
[88] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.228
[89] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.228
[90] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.229

283. Labor's hand-picked Fair Work Review Panel examined the operation of greater flexibility for the FWC in how matters proceed and are determined, and concluded that:

> *It does not appear that providing the FWC[91] with flexibility to determine these matters has led to any obvious injustices or unintended results.*

284. The FWC in its hearing of matters goes to significant efforts to ensure procedural fairness and the fair conduct of hearings. This includes significant aid to unrepresented applicants to ensure they have a fair opportunity to advance their claims. In fact, the FWC assists unrepresented applicants to such an extent that it can significantly frustrate employer respondents.

285. The Committee can take confidence in the independence and rigor of the FWC in exercising powers comparable to those that would be granted by Schedule 1, Part 6 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015.*

The FWC must be able to dismiss matters where appropriate

286. The Fair Work Review Panel concluded that the FWC currently lacks the full range of tools to properly deal with the range of matters that come before it:

> *…we conclude that through a combination of the FW Act provisions and FWA practice, the objective to dispose of claims flexibly and informally is not being fully met…*
>
> *We also consider there is merit in expanding the capacity of FWA to dismiss applications that are totally lacking in merit, or when an applicant has failed to attend a proceeding, adhere to a settlement or comply with FWA directions.*[92]

287. Labor's Fair Work Review Panel specifically recalls ss.645, 646 and 648 of the preceding *Workplace Relations Act 1996* with approval and recommends that "*the Fair Work Act* should be amended to include similar provisions".[93] That is what Schedule 1, Part 6 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* seeking to do.

There is no disadvantage to employees

288. The ACTU submitted to this Committee in relation to the equivalent Schedule 1, Part 9 of the *Fair Work Amendment Bill 2014*, as follows:

> *2.87 The ACTU criticised the inclusion of Part 9, arguing it would advantage employers over employees in hearings before the Fair Work Commission. They submitted the summary dismissal powers would benefit employers, and that Part 9 would allow hearings and inquiries being*

[91] Corrected to 'FWC' for clarity, the original quite read 'FWA'. This was the then combined entity which has subsequently been restored to its constituent parts (the FWC and its administrative or registry arm.
[92] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.229
[93] Fair Work Review Panel (2012) Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation, Canberra, p.229

> *determined on the papers. Further, they argued that Tribunals of the Fair Work Commission generally try to ensure equity by assisting unrepresented parties in the process:*
>
> *If an unrepresented applicant is unable to properly articulate in a written submission why the matter should not be dismissed, they will be disadvantaged by these provisions.*[94]

289. Such matters were considered by Labor's hand-picked Fair Work Review Panel and the Panel on balance recommended the changes that appear in Schedule 1, Part 6 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015.*

290. The FWC would not be obliged to refrain from holding a hearing. Rather, it would gain greater discretion to not hold a hearing and would in future determine whether to not do so based on "equity, good conscience and the merits of the matter"[95].

291. The only obligation created would be to provide a right to be heard where a hearing is not listed (i.e. the sole obligation is to procedural fairness and the safety net of a procedural hearing where a decision to not hold a hearing is disputed).

292. The new provisions proposed in Schedule 1, Part 6 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* are not relevant where someone has competent representation and advice, and wishes to proceed with their claims. They are going to come into consideration only in a fractional minority of cases where an applicant is unrepresented, wishes to proceed with a case devoid of merit or capacity (and in only a minority of those cases), or fails to progress their application.

293. Even in these cases the Committee can be confident there is support for unrepresented applicants. According to the FWC website:

> *The Commission commenced a permanent pro bono scheme in Melbourne on 1 July 2014. Along with the pro bono scheme currently operating in Sydney, it provides free legal advice to unrepresented parties in unfair dismissal jurisdiction hearings.*[96]

The FWC will be the safeguard

294. Above all, the Senate can be confident that the ultimate protector of employee interests and rights will be the Fair Work Commission (FWC).

295. The amendments in Schedule 1, Part 9 bestow discretion on the FWC, and the Senate can have confidence that this discretion will be employed sparingly and fairly.

[94] Senate Education and Employment Legislation Committee, Report: Fair Work Amendment Bill 2014 [Provisions], (April 2014), p.28
[95] Section 578(b) of the *Fair Work Act 2009*.
[96] https://www.fwc.gov.au/at-the-commission/how-the-commission-works/practice-notes/unfair-dismissal-proceedings

296. We also draw attention to proposed s.399B which obliges the FWC, before declining to hold a hearing, to invite further information or input form parties and to take into account what they are told.

How to proceed

297. The Committee should recommend passage of Schedule 1, Part 6 of the Fair Work Amendment (Remaining 2014 Measures) Bill 2015

PART B – PREVIOUS AMMA SUBMISSION ON 2014 BILL

In April 2014, AMMA lodged a 48 page submission in support of the passage of the previous *Fair Work Amendment Bill 2014* with this Committee.

The six Parts of that Bill that were not passed in late 2015 have now been reintroduced in the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

This second part (Part B) of AMMA's submission resubmits our previous material in support of these amendments, with updated cross referencing to reflect the different numbering in the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*, its Explanatory Memorandum etc.

This is effectively Submission #26 that the Committee received in its previous inquiry into the 2014 Bill, with updated numbering to reflect the reintroduction of those measures that did not pass in the spring session of 2015.

AMMA reiterates these previous arguments and invites the Committee to reconsider them, bolstered by the rebuttals to arguments raised against the various parts of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (canvassed in **Part A**).

SCH 1 – PART 1 - LEAVE LOADING ON TERMINATION

1. Part 1 of Schedule 1 to the Remaining Measures Bill amends s.90 of the Act to provide that on termination of employment, untaken annual leave accrued under the NES is to be paid out at the employee's base rate of pay.

2. The 2015 EM indicates that the "*amendments in this Part implement Fair Work Review Panel recommendation 6*".

3. Item will amend subsection 90(2) (and legislative notes accompanying s.55) to ensure that where an employee, who has a period of untaken annual leave at the time when the employment of the employee ends, the employer:

   a. Must pay the employee an hourly rate for each hour of paid annual leave that the employee has accrued and not taken; and

   b. That the hourly rate must not be less than the employee's base rate of pay that is payable immediately before the termination time.

4. The EM indicates (paragraph 6, p.2) that:

   > *"The amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay."*

5. Amendments to the legislative notes to s.55 ensure that modern awards and enterprise agreements are permitted to provide more beneficial terms than the minimum statutory standards provided by the NES.

6. AMMA strongly supports the clarification of what unfortunately became a source of concern to the resource industry (and to employers generally) when the Office of the Fair Work Ombudsman reversed its interpretation of the issue and indicated that it would pursue employers for failing to pay upon termination annual leave loading accrued on annual leave under the NES where that was payable during the employment relationship.

7. This was in direct contrast to the submissions of AMMA and other employer and business groups to the FWO and to the-then Labor Government about longstanding industry practice.

8. AMMA argued in its written submissions to the Fair Work Review Panel that the FWO's interpretation was contrary to the custom and practice adopted by resource sector employers (that leave loading was only payable if an award or agreement included an express entitlement) and would lead to an unintended 'windfall gain' to employees that Parliament did not intend, in addition to exposure of significant civil penalties for employers.

9. AMMA also took a lead role on the issue when it intervened in a matter which went before the NSW Chief Industrial Magistrates' Court in February 2011 (*CFMEU v Whitehaven Coal Mining Ltd*).

10. As noted by the Fair Work Act Review Panel in its August 2012 report[97] "*…the interpretation of the provision by the FWO, in contradistinction to the interpretation of many employer representatives, has meant that longstanding arrangements under awards and enterprise agreements have been disturbed*".

11. The Panel ultimately recommended as follows:

> "*[b]acked with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s.90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees*".

12. The Bill's amendments in this area will only have prospective effect, in so far as they will apply to terminations of employment occurring after the provisions commence upon Royal Assent.

13. It is important that the provisions have retrospective effect given that the FWO and unions may still attempt to prosecute employers for breaches of the NES where an employer does not normally pay leave loading upon termination but does during the employment relationship.

14. This could foreseeably occur for allegations which are said to have materialised prior to the commencement of this amendment, but still within the statute of limitation period for prosecuting civil breaches under the Act (ie. six years).

AMMA's position on the annual leave loading on termination provisions

AMMA supports the passage of Schedule 1, Part 1, with consideration of limited retrospective application to preclude unforeseen and unmerited gains to ex-employees and to avoid perpetuating the confusion caused by previous flawed statutory construction.

[97] Fair Work Act Review Panel Report, August 2012, p100

SCH 1 - PART 1 – LEAVE ON WORKERS' COMPENSATION

15. Schedule 1, Part 2, Item 4 of the Remaining Measures Bill will repeal subsection130(2) of the Act with the effect that *an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue leave under the Fair Work Act during the compensation period.*

16. AMMA supports this amendment which was recommended by the Fair Work Review Panel at p.89 of its report. The Panel noted in its report (at p.88) that "*s.130 of the FW Act is, regrettably in the majority of the Panel's view, not clearly worded*".

17. The Panel noted that in various jurisdictions it was unclear as to whether relevant state/territory workers' compensation laws permitted or did not permit various types of leave to be accrued and/or taken while an employee was on workers' compensation. The Panel noted (at p.88) that the situation was "*confusing for affected parties and may involve costs – for example, in obtaining legal advice*".

18. The amendment will provide clarity for employers upon commencement. However, and similar to the concern raised by AMMA in relation to the annual leave loading on termination issue (*see previous section*), Item 5 should also have retrospective application to ensure that employers are not subject to possible legal liability from the date of the commencement of s.130 of the Act (1 January 2010).

AMMA's position on the accrual of leave on workers' compensation provisions

AMMA supports the passage of Schedule 1, Part 2 with appropriate safeguards outlined above.

SCH 1 – PART 3 – INDIVIDUAL FLEXIBILITY AGREEMENTS

19. The Bill's provisions regarding IFAs are on the whole extremely positive and a step in the right direction for individual agreement making and workplace flexibility, albeit within IFA architecture that needs more fundamental re-examination in due course.

20. In AMMA's April 2012 submission to the General Manager of Fair Work Australia on the operation of the first three years of IFAs, AMMA pointed out that:

    a. The estimated take-up rate of IFAs in the resource industry was less than 5%.

    b. Resource employers perceive IFAs in their current form as being of little or no value.

21. As pointed out in AMMA's May 2010 paper, *IFAs: The Great Illusion*:

    a. The mandatory inclusion of flexibility terms in enterprise agreements has not delivered genuine workplace flexibility because in many cases negotiating such terms with unions reduces them to mere tokens.

    b. To make IFAs more attractive to employers, the breadth of flexibility available under award and agreement flexibility clauses is crucial, as is reducing scope for unions to trivialise or render nominal flexibility through bargaining.

    c. The "model" flexibility clause, while common in modern awards, is often not used in enterprise agreements (AMMA therefore welcomes the Bill's proposal that the model flexibility clause become a minimum to be built on in negotiations).

    d. The ability for an employee to unilaterally terminate an IFA with just 28 days' notice severely detracts from the benefits of such arrangements for employers (AMMA therefore welcomes the Bill's extension of termination periods by either party from 28 days to 90 days, consistent for IFAs made under modern awards and enterprise agreements).

22. As AMMA's February 2012 submission to the Fair Work Act Review Panel highlighted, employers have found the flexibility clauses they are able to negotiate with unions under the Fair Work Act often only benefit employees and offer little or no flexibility to the enterprise.

23. This was not what the former government sold users of the system in proposing IFAs as an alternative to AWAs.

24. Scope to agree flexibility has gone backwards and it is important the system now be made more usable and live up to its stated intentions.

Positive aspects of Schedule 1, Part 3

25. AMMA welcomes the Bill's broadening of the mandated level of flexibility under awards and agreements to all areas covered by the "model" flexibility clause.

26. This means if an agreement or award includes terms relating to the following, an IFA can be made with an individual employee varying such terms:

    a. Arrangements about when work is performed.

    b. Overtime rates, penalty rates, allowances, and leave loading.

27. This progresses Fair Work Act Review Panel Recommendation 9.

28. AMMA also welcomes the Bill's explicit confirmation that the Better Off Overall Test (BOOT) will allow an IFA to confer a non-monetary benefit in exchange for a monetary benefit. This is about recognising that employees, in particular those with family responsibilities, can value and prioritise non-remunerative parts of their work arrangements.

29. AMMA also welcomes the Bill's introduction of a defence for employers to an alleged breach of a flexibility term where the employer believes all requirements have been met in entering into the IFA.

    a. This gives effect to Review Panel Recommendation 11 and starts to restore some confidence and trust in users of the system where they act in good faith.

    b. AMMA would like to see this principle applied more widely across our workplace relations system.

30. AMMA is also pleased there is no retrospective requirement for a "genuine needs" statement for existing IFAs made under modern awards and enterprise agreements with statements only required for IFAs made after the provisions commence.

31. For IFAs made under enterprise agreements, AMMA is pleased that the genuine needs statement will only apply to IFAs made under new agreements certified after the commencement date of those provisions.

Key concerns with Schedule 1, Part 3

The genuine needs statement

32. AMMA members' primary concern with the Bill's IFA provisions is the requirement for employers to ensure employees provide a "genuine needs statement" when entering into an IFA.

33. Each employee would be required to provide a statement that the IFA leaves them better off than they would otherwise have been and detailing why the arrangement meets their genuine needs.

34. The Bill purports to merely formalise current requirements via a written record.

35. However, AMMA members are extremely concerned about how this requirement will operate in practice.

36. This threatens to create such a level of complexity and administrative burden on businesses that it will dissuade them from using IFAs. It risks discouraging use of one of the few mechanisms under awards and agreements to access flexibility, e.g. for work-family balance.

37. Given that employees are not currently required to provide such a written statement, it seems onerous to apply such a requirement to future arrangements, particularly given the protections that require employers to ensure IFAs leave employees better off overall.

38. This proposal reflects an excess of caution and a deficiency of trust in the maturity and judgement of users of the system.

39. It also reflects a slightly paternalistic assumption regarding employees.

40. Employees should be able to agree flexibility and have the freedom to make such decisions protected. It is not necessary or practical to try to have employees attest that they are better off. They either agree or they do not, and the arrangement either meets the prescribed standards or it does not.

41. AMMA presumes this has been included in the Bill to protect employees who may be trading off monetary benefits for non-monetary benefits, which is explicitly allowed in the Bill. However, there are better ways to do this (*see below*).

42. Other problems with the requirement for a genuine needs statement:

    a. Many employees will find the requirement to write a statement from scratch on those issues daunting and stressful.

        i Employment scares many people (something not assisted by the consistent fear-mongering of recent years in relation to individual flexibility and collective agreements).

        ii Some employees may fear committing themselves to writing in relation to their terms and conditions of employment and assume they are altering their contractual terms or making a change they cannot reverse.

    b. There may be particular concerns and reticence by employees for whom English is not their first language or for those with low literacy.

    c. This may, for example, have the effect of discouraging someone who is illiterate from requesting flexibility which would be of assistance and benefit to them.

d. Consider, for example, the burden of asking a recent migrant, whose first language is not English, to commit themselves to writing on why a particular arrangement meets their needs and will leave them better off.

e. In addition, the reason for the flexibility, and the perceived benefit to the employee, may be private. It is no business of the employer or the HR department whether someone is volunteering with a charity or building model railways. A requirement to detail why the arrangement meets the employee's genuine needs risks stepping into the personal to an extent employers, let alone employees, will be uncomfortable with.

f. This requirement also thereby risks opening up a Pandora's Box of value judgements, personal considerations and allegations of discrimination.

g. Employers will also not want to be seen to be assisting workers with what to write, even if assistance is requested, as that could be perceived as a type of coercion.

h. Limiting the form to a tick the box pro forma that an employee then signs will make this task much less onerous than currently proposed in the Bill.

Proposed amendments to the Bill

Option 1

43. AMMA's preference would be for the requirement for a genuine needs statement to be removed from the Bill entirely, whilst of course retaining protections ensuring employees are left better off overall after entering into an IFA.

Option 2

44. Alternatively, the requirement to provide a genuine needs statement should only apply in relation to IFAs where a monetary benefit has been traded off for a non-monetary benefit.

45. In cases where the take-home pay stays the same or increases, there should be no need to provide a statement as there is little risk employees would not be better off.

Option 3

46. Make the statement a pro-forma rather than requiring each employee to elucidate in writing why they believe they are better off.

47. Ideally, a single employee signature on a document stating that the IFA is agreed to and meets their genuine needs should be the only requirement.

AMMA's position on the individual flexibility arrangement (IFA) provisions

AMMA supports passage of Schedule 1, Part 3, subject to:

- The removal of requirements for a genuine needs statement (Option 1 above)

If the genuine needs statements are retained, Part 3should be amended to:

- Require a genuine needs statement only where a monetary benefit has been traded off for a non-monetary benefit (Option 2), and
- Make the genuine needs statements a simple pro forma (Option 3).

SCH 1 – PART 4 - TRANSFER OF BUSINESS

48. Taking on the employees of an enterprise that has been bought or merged is a very delicate human resource strategy consideration for employers and has to balance the value of retaining knowledge and experience with other considerations such as:

    a. The legal liability and risk of keeping existing staff along with their transferring industrial instruments.

    b. The relative terms and conditions of those employees under transferring instruments compared with others within the incoming business.

    c. The relative costs of employing those workers against the financial and performance goals of the enterprise.

49. In the resource industry, having to take on another employer's enterprise agreement in the event of a sale or outsourcing arrangement is deterring new owners / providers from employing the former owner's employees. This is true even if those employees have directly relevant skills and experience that would benefit the incoming operator.

50. As AMMA pointed out in its February 2012 submission to the Fair Work Act Review Panel, the current transfer of business rules, which mean an employee's industrial instrument transfers across with them in the event they are taken on by the new owner of a business, represent a serious inefficiency for new business owners and a massive disincentive to employment.

51. AMMA therefore welcomes the Bill's provisions that will remove those restrictions for transfers between "related entities".

52. However, transfers between "related entities" represent only a minority of circumstances now captured by the Act's transfer of business provisions. The Bill will not provide as much relief as it could if those provisions applied more broadly.

Positive aspects of Schedule 1, Part 4

53. The Bill gives effect to Fair Work Review Panel Recommendation 38, which was to amend s311 of the Act to "*make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer*".

54. The Bill seeks to amend both Part 2-8 of the Act dealing with transfers between national system employers and Part 6-3A dealing with transfers between state public sector employers and national system employers.

55. The Bill provides there will not be a transfer of business when the new employer is an "associated entity" of the old employer if the employee has sought to become employed by the new employer of their own initiative.

56. The term "associated entity" is defined in s12 of the Fair Work Act 2009 as having the meaning given by s50AAA of the *Corporations Act 2001*.

57. Unfortunately, the Bill's provisions will not apply further than scenarios in which the old and new employer are "associated". The Bill's welcome reprieve will therefore only apply to a very limited number of employers. Other employers will continue to have to apply for an exemption from the transferring instrument from the FWC or to have the transferring agreement set aside and, in doing so, go to great time and expense to manage the transfer for current and future employees.

58. In AMMA's view, broader application of the Bill's provisions is warranted given the current rules are a deterrent to employment and creating significant administrative imposts for business.

Key concerns with the current transfer rules

59. Under the current rules, transfers of employees from one business to another are unjustifiably time-consuming and expensive as employers navigate complex risks and liabilities.

60. In a case study of one AMMA member company, two recent transfer of business scenarios cost the company a total of $120,000 in legal expenses alone.

Transfer of business – Scenario 1

In the oil processing sector, the company applied for a s222 application for the FWC's approval of the termination of a transferring enterprise agreement.

The number of internal person hours devoted to this exercise was around 140, with a significant cost to business in the form of HR and other staff salaries.

The preparation of employee information documents alone cost the business around 40 hours.

In order for the transferring employees to vote on whether to have their transferring instrument set aside, the employer had to provide and host a voting website which cost $5,000, the customary price for such services.

Following an overwhelming majority vote supporting the setting aside of the agreement, the FWC took three weeks to make orders to that effect, following several months leading up to the employee vote.

In the five months between the transferring employees being taken on by the new business and the FWC handing down its orders, the impacts on the new business owner included:

- Having to pay for an outsourced payroll provider for five months to administer the transferring employees' fortnightly pay cycles (existing employees were paid on a different pay cycle).

- Having leave balances (and hence liabilities) across the business inaccurate for those five months.

- Having to maintain a different roster for transferring employees for five months.

- Having to provide different pay rates for supervisors and those covered by the transferring enterprise agreement for five months.

- Having to manage disgruntled transferring employees who wanted to be on the same roster as their colleagues while having to wait for FWC orders to set their agreement aside.

- Incurring $76,000 in legal costs associated with the transfer of business scenario.

Transfer of business – Scenario 2

In the surface mining sector, the company applied for a s318 application from the FWC seeking orders that the transferring industrial agreement not apply at the new enterprise.

The number of internal person hours devoted to this exercise was around 110, at a significant cost to the business.

Around 40 hours were involving in putting together presentations for employees and communicating those presentations to employees.

Following the application for an exemption with the FWC, it took two weeks for the agreement to be exempted by the commission.

In the interim period, the company had to:

- Set up a weekly payroll run for transferring employees with an outsourced provider in case the agreement was not set aside in time.

- Communicate complicated messages to employees about the differences between the transferrable instrument and the company's established agreement, leading to some confusion among employees.

- Incur legal costs associated with the transfer of business scenario of $45,000.

61. These are significant costs to businesses purely because of an inability under the current system to take on the employees of another company under their own agreement, even where that agreement clearly offers equal or superior terms and conditions.

62. In the above cases, the purchasing company's existing agreements included a range of benefits not offered in the transferrable instruments including a bonus structure and the capacity to salary sacrifice flights.

63. In short, this process required a huge effort for something that in the end did not add any value to either the transferring employees or the employer. Neither employers nor employees are well-served by the current transfer of business rules.

Why bother? The impact on job security and employment

64. The obvious question is why any new employer would bother given the transfer of business scenarios outlined above. The costs, complexities and delays of the current approach discourage employers from attempting to take on qualified and experienced staff of companies they purchase or take over the functions of via an outsourcing arrangement.

65. This is a significant question for job retention, particularly if the existing employees are older, lower-skilled or have more operation-specific skills and experience (i.e. that are less valued on an open jobs market).

66. Our system should better support employers interested in retaining existing staff to do so, and under no circumstances should it provide legal and compliance barriers to discourage employers from taking on staff they would otherwise want to retain.

The potential for industrial unease

67. The potential for, at the very least, miscommunication among employees in the event the employer is providing two or three different sets of terms and conditions on one site for the same work is huge. This does not bode well for industrial harmony or simplicity in managing employees and their conditions – and these concerns come on top of a change of management and employers seeking to engender trust and confidence with their new employees transferring from their former employer.

68. In some cases, AMMA member companies have had to say to a business they are taking over through an outsourcing arrangement that they absolutely will not employ any of the existing employees.

69. We ask the Committee to particularly reflect on that – it is a sobering if not distressing development for our labour market driven by the previous policy choices of those setting our workplace laws.

70. It is almost always the case in deciding whether to take on state public sector employees that national system employers will not take any of them on because their agreements often contain massive inflexibilities and high levels of union involvement at every step of the way.

71. The implementation of the *Fair Work Amendment (Transfer of Business) Act 2012* in December 2012 roped state public sector entities into the Fair Work Act's already unworkable transfer of business provisions applying to private sector organisations, to the detriment of both employers and employees.

72. Note it is no lack of confidence in hiring such employees from the incoming employer that causes the problem; it is uneconomic and impractical obligations that would transfer with them.

73. If not for the current transfer of business rules, AMMA member companies would employ a significant proportion of any client's employees in an outsourcing arrangement.

74. More often than not, the outsourced work can be performed better if they take on some employees of the old employer. Typically, a business would choose to take on about 50% to 70% of the outsourced company's employees if there were no inbuilt structural disincentives to doing so.

75. The danger for workers who are not picked up, of course, is they will end up on the unemployment queue. The disadvantage for new business owners is they will lose valuable long-term skills from the enterprise and experience in the operation and working with customers.

76. While the Bill's transfer of business amendments are very positive to the extent that they apply, AMMA believes they should have much broader application to all transfer of business scenarios under the Act where employees transfer of their own initiative. This would encourage employment, efficiency and productivity.

Proposed amendments to the Bill

Return to the pre-Fair Work Act rules

Option 1

77. Extend the Bill's transfer of business exemption to all transfer of business scenarios where employees are transferring of their own initiative, particularly to outsourcing arrangements.

Option 2

78. Revert to the pre-Fair Work Act "transmission of business" rules.

79. The pre-Fair Work Act "transmission of business" rules were relatively clear, with the Federal Court in September 2008 confirming they did not apply to outsourcing arrangements[98].

80. Under the pre-Fair Work Act rules, if a business was outsourced it would never have involved the transfer of existing employees' industrial agreements to the new employer.

[98] *Urquhart v Automated Meter Reading Services (Australia) Pty Ltd* [2008] FCA 1447, 23 September 2008

AMMA's position on the transfer of business provisions

AMMA supports:

- Extending the Bill's transfer of business exemption to all transfer of business scenarios where employees are transferring of their own initiative, particularly in outsourcing arrangements (Option 1 above).

Alternatively:

- Reverting to the pre-Fair Work Act "transmission of business" rules (Option 2 above).

SCH 1 – PART 5 - UNION ENTRY (RIGHT OF ENTRY)

81. Any rules empowering unions to enter employer premises must be subject to appropriate checks and balances in the same way as any other visits to a site, as AMMA pointed out in its June 2013 *Resource Industry Workplace Relations Election Paper: Trade Union Access to Workplaces*,

82. AMMA does not see union access to workplaces as a right. It is a fundamental tenet of our legal system that rights to access premises / land are severely limited to anyone other than the land owner or occupier, or those they permit to enter. Police, sheriffs and the like do not have a right to enter premises in Australia and require a warrant. Owners of a property do not have a right to enter rented property and do so under limitations.

83. Union access to work premises is a unique grant of privilege for a specified purpose, and it needs to be understood as such to properly inform sound policymaking in this area. As such, AMMA proposes that the provisions in the Bill and the Fair Work Act in this area be included under the banner of "union entry" rather than "right of entry".

84. AMMA believes Australia had the checks and balances right in this area prior to the introduction of the Fair Work Act on 1 July 2009, and it is to that pre-Fair Work Act system that AMMA would like the current system to return.

85. In 2007, then-Deputy Opposition Leader Julia Gillard famously promised to retain the Workplace Relations Act's existing right of entry rules in the move to the Fair Work Act[99]:

> *"I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like … we will be delivering our policy as we have outlined it [ie retaining the existing right of entry laws]."*

86. That promise was not honoured. But more important than the politics of broken promises was the Labor government's change of position away from sound and established policies to a model that has created significant practical problems.

87. The commencement of the Fair Work Act on 1 July 2009 saw massive changes to Australia's union right of entry system. Matters were made significantly worse for businesses in further amendments that took effect on 1 January 2014, which further opened up lunch rooms and remote sites to more union visits than ever before.

88. The Coalition while in Opposition opposed those amendments when they were before parliament in 2013 but this did not stop them passing into law.

89. AMMA therefore welcomed the commitment in the *Policy to improve the Fair Work laws* in May 2013 that a Coalition government would repeal Labor's latest

[99] Deputy Opposition Leader, Julia Gillard, National Press Club Address, 8 November 2007

damaging amendments and return to a system modelled on the pre-2009 right of entry laws:

> *"A Coalition government will change the Fair Work laws to ensure union right of entry provisions are modelled on the promise that Julia Gillard made in 2007. We will also oppose Labor's latest attempts to go even further, and, if they become law, a Coalition government will repeal them."*

90. This was a welcome policy commitment given the problems that AMMA members are experiencing under the current rules, which include but are not limited to:

a. **Union officials causing** repeated disruptions to businesses via excessive visits for discussion and recruitment purposes.

b. **Difficulties ascertaining** which unions are entitled to enter premises to meet with workers due to complex and sometimes indecipherable union eligibility rules.

c. **The ability to include** clauses in enterprise agreements conferring even greater union access to worksites than is delivered under the Act.

d. **Increasing industrial instability** arising from multiple and often competing unions visiting worksites under the current basis of entry for discussion purposes.

Positive aspects of Schedule 1, Part 5

91. The Bill contains some extremely positive amendments to the Act on union access to workplaces. AMMA welcomes those amendments, chief among them the proposed repeal of the damaging aspects of Labor's changes that took effect on 1 January 2014.

92. AMMA's concerns about the 1 January 2014 right of entry provisions were documented in detail in our submission on the *Fair Work Amendment Bill 2013*. All of those concerns and more in relation to the provisions have been borne out in practice, with parties fighting it out in the tribunal at present about the scope and breadth of those changes in a raft of matters.

93. AMMA welcomes the Bill's proposal to remove entirely the schedules of the Act requiring employers to provide transport and / or accommodation to union officials to facilitate their access to remote sites.

94. AMMA also welcomes the Bill's proposed repeal of the provisions that removed employers' ability to designate a "reasonable" meeting location at which unions could hold discussions with members or eligible members.

95. AMMA further welcomes the Bill's removal of some of the constraints around employers' capacity to challenge the frequency of union entry by taking a dispute to the FWC. Issues around frequency of union visits are well-documented in AMMA's submissions and research papers since the Fair Work Act began.

96. The Bill's changes in this area are overwhelmingly positive for the resource industry. Once the Bill is enacted, it will bring things back to the pre-1 January 2014 approach, with the added benefit of a bolstered dispute resolution mechanism regarding frequency of union entry.

97. This is welcome, but the Bill can and should do more to return the basis for union entry for discussion purposes to what it was prior to the Fair Work Act being introduced. This approach is entirely open to the government consistent with its stated policy.

Key concerns with Schedule 1, Part 5

Basis for union entry to hold discussions

98. The Bill makes some modifications to the basis on which unions can enter worksites to hold discussions (currently regulated under s484 of the Fair Work Act) but falls short of the scope of reform necessary to fully address business concerns in this area.

99. The *Coalition's Policy to improve the Fair Work laws* states that unions can seek entry to a workplace for discussion purposes if:

- *The union is covered by an enterprise agreement that applies to the workplace;* ***or***
- *The union is a bargaining representative seeking in good faith to make an agreement to apply in that workplace;* ***and***
- *There is evidence that it has members in that workplace who have requested their presence.*

If a workplace is covered by a modern award, or, an enterprise agreement that does not cover a particular union, access will only be allowed if:

- *The union can demonstrate they have, or previously have had, a lawful representative role in that workplace;* ***and***
- *There is evidence that the workers or members have requested the presence of a union.*

100. The Bill deviates from the above in key ways but, more importantly, has moved away from the "principle" of returning to the pre-Fair Work Act right of entry rules to the extent that this is possible.

101. When looked at in detail, the Bill does two things in this area:

a. **Confirms** that if a union is covered by an enterprise agreement onsite, it will continue to have entry for discussion purposes under the current rules as outlined in the Fair Work Act as it currently stands.

b. **Places** one additional requirement on unions that are not covered by an enterprise agreement onsite (even for sites where other unions are

covered by agreements) by requiring a member or potential member to extend an invitation to the union to enter.

102. The Bill does not require unions under scenario (a) above to prove a member has requested their presence onsite. Nor does it require unions under scenario (b) to prove they have or have had a lawful representative role in the workplace.

103. This deviates from the substance and principle of the Coalition's policy, and from the pre-Fair Work Act status quo to which employers support the system returning.

104. Under s760 of the then *Workplace Relations Act* as it stood immediately prior to the Fair Work Act, unions only had rights to enter worksites to hold discussions if the relevant employees carried out work that was covered by an award or collective agreement that was binding on the union **and** there were eligible members or members performing that work.

Invitation certificates

105. There are genuine concerns regarding the proposed system of "invitation certificates" under the right of entry provisions of the Bill as currently drafted.

106. Such certificates are aimed at proving there is an invitation by a member or potential member for a union to enter a site if the union is not covered by an enterprise agreement onsite.

107. AMMA members' threshold objection to this framework is that invitation certificates should not be available to gain entry onto sites where another union has an enterprise agreement in place with the employer. Again, this was the pre-Fair Work status quo which Labor previously promised to adhere to; it is the pre-Fair Work status quo that the government has signalled it intends to return to; and it is the approach to which the system should return.

108. Enabling invitation certificates to be obtained by unions not covered by agreements in order to gain entry to agreement-covered sites risks undermining the positives that would be achieved by the rest of the Bill's amendments on union entry. This is a fundamental concern.

109. As an example, on one major project site that is starting to mobilise, only one union has signed up to a project agreement but under the Bill as drafted, other construction unions would be able to be invited in by members (or potential members) and continue to agitate and cause disharmony on the site. That union was initially involved in negotiations but refused to sign on because they did not like the rostering arrangements.

Proposed amendments to the Bill

Basis for union entry to hold discussions

110. While the nature of awards has changed under the Fair Work Act and unions are no longer "bound" by modern awards or enterprise agreements, it is still open to Parliament to require a union to be covered by an enterprise agreement in order to gain entry for discussion purposes.

111. That is a fundamental change that AMMA would like to see in the Bill (indeed it would be a return to the pre-Fair Work Act status quo as intended).

112. Where an employer and employees have chosen to make an enterprise agreement without the involvement of a particular union, that union should not have access to that site at all, in AMMA's view, as that is how it was prior to the Fair Work Act coming into effect.

113. Only on those sites where there is no enterprise agreement in place with another union or unions should another union be able to enter for discussion purposes. On non-agreement covered sites, a union should only be able to gain entry if it is invited in by a member on that site, not a potential member.

Invitation certificates

114. AMMA members have concerns with the form and content of invitation certificates that could be addressed through amendments to the Bill itself and/or through the EM or Regulations:

    a. AMMA members believe the system of invitation certificates should not allow "standing warrants" or open-ended invitations to apply at the discretion of FWC members who will be issuing the certificates.

        i Whatever the final form of these provisions, it is vitally important that these certificates are not open-ended or granted for such an extended period that they become a standing warrant or open license to enter premises.

        ii They must remain occasion-based and only provide for specified entries.

    b. Certificates should allow one entry on one specified day during one meal break only (i.e. they should act in the same way as an entry notice once obtained from the commission).

    c. There must be a cap on how many certificates can be issued, ideally a maximum of one entry per month per union and, as proposed above, only at non-enterprise agreement-covered worksites. Without appropriate caps on the number of certificates (i.e. visits), the Bill's other provisions which bolster employers' ability to challenge frequency of entry are in danger of being undermined.

d. Limiting invitation certificates to non-enterprise agreement-covered worksites will reduce the administrative burden on the FWC in having to deal with potentially thousands of applications per year. With a brand new anti-bullying jurisdiction to administer, including fast-tracked resolution of those matters, a too wide system of invitation certificates will divert FWC resources away from applications that are of real value to stakeholders to sort out.

e. There must also be strict criteria around what the certificates allow. If not, AMMA members fear they will see FWC members exercise their discretion in ways that are unfavourable to the business community.

f. Employers and occupiers should be informed that an invitation certificate has been applied for at their site and ideally have a chance to be heard in relation to it.

g. At least 24 hours' notice should apply in relation to entry under an invitation certificate.

h. Certificates must have a "stated purpose" as to why the union is entering and should not allow speculative fishing expeditions.

115. AMMA and its members do not seek to prevent unions doing their critical work, but the key is to make sure the Bill's right of entry provisions are sensible and reward parties for agreement making.

Photo Identification permits

116. The Coalition's 2013 *Policy to improve the Fair Work laws* included a requirement for union officials to produce photo ID upon request by the employer / occupier.

117. That requirement is not contained in the Bill. However, AMMA supports urgent action on this important issue.

118. Again, the Committee should consider wider practice in our community in considering the standards and responsibilities union officials should be subject to when exercising unique powers bestowed upon them by the state.

119. Inspectors, local government officials, community workers, and even charity collectors all carry official photographic ID to ensure:

a. They are who they say they are.

b. Those they interact with can have confidence in their identity and accountability in the discharge of their functions.

c. There is clarity about who entered premises on what basis if and when allegations of impropriety or illegality arise.

120. Importantly, photographic ID protects the ID carrier and all persons they deal with.

121. Even couriers and the people who fill up the soft drink machine increasingly carry photographic identification. Whilst police do not carry photographic ID, they do clearly display their name.

122. It would be extraordinary if union officials were held to lesser standards of proof and confidence than our public officials, a proposition made all the more extraordinary when one considers:

a. The questions being posed about the character and conduct of some union officials both in public debate and the current Heydon Royal Commission.

b. The apparent growing interest of organised crime, and other unregistered interests and figures, in becoming involved in industrial relations at various levels.

c. The very real fears that criminal gangs and other unsavoury elements are purporting to pursue industrial relations matters in this country.

123. It is vital that there is scope to quickly identify genuine union officials and confirm their identity to distinguish them from unregistered, unaccountable and potentially criminal elements.

124. One would have thought an official identity confirmation that would rapidly separate properly registered and regulated union officials from others purporting to represent employees would have been welcomed by the union movement.

125. The importance of photographic ID for union officials seeking to enter worksites is underscored by two very recent developments:

126. Alleged misrepresentation 1: The following report from the *Australian Financial Review* online of 23 April 2014[100] illustrates the type of conduct regarding union officials' identity which photo ID would properly regulate:

> *In March a project at Sydney's Mascot was slowed by the arrival of two union officials, one of whom is alleged to have claimed to be Steve Irwin.*

127. Assuming the official's name wasn't Steve Irwin, it is important that he be accountable to the system under his proper name, and accountable in particular for his conduct on site exercising what are statutory powers.

a. Were any complaints made, it would be vital that all parties, including the union official, have the proper protection of identity confirmation.

b. Were a government official to have sought to exercise his or her powers using a false or concocted name, they would potentially be guilty of very serious misconduct, if not corruption / breaches of public sector standards.

[100] Stevens, M. 23/04/14, The battle to tame the building union, Australian Financial Review, viewed at http://www.afr.com/p/business/companies/the_battle_to_tame_the_building_2jMFyNs0w7vG3kMeWaFPVN

c. Giving a false name to police is an offence.

128. Alleged misrepresentation 2: We also draw the Committee's attention to a recent media statement[101] from SafeWork South Australia (*below*), responding to a "*spate of reports of people attending workplaces and falsely claiming to be an authorised SafeWork SA inspector*".

MEDIA STATEMENT

Government of South Australia
SafeWork SA

Friday, 14 February 2014

SafeWork SA investigating bogus inspectors

SafeWork SA, the state's work health and safety regulator, is asking people to request photo identification when an inspector requests workplace access.

This follows a spate of reports of people attending workplaces and falsely claiming to be an authorised SafeWork SA inspector.

SafeWork SA is concerned that South Australian workers and businesses are receiving incorrect or misleading WHS information which may compromise work health and safety.

It is an offence to impersonate an inspector and any person doing so may be subject to a maximum penalty of $10,000. SafeWork SA is investigating these incidents with a view to initiating prosecution action.

SafeWork SA inspectors always carry authorised inspector photo identification, provide their full name and wear a uniform.

SafeWork SA encourages employers or officials at workplaces to require proof of identity and check the credentials of any unknown person seeking site access.

SafeWork SA will only direct authorised inspectors to conduct site inspections, and will never direct any person who is not an authorised inspector to conduct any work on our behalf.

SafeWork SA encourages anyone with information about bogus inspectors to telephone 1300 365 255.

END

129. Two matters particularly stand out from this which are directly relevant to the importance of union officials carrying photographic ID when exercising statutory grants of power to enter any worksite:

a. "*SafeWork SA inspectors always carry authorised inspector photo identification, provide their full name and wear a uniform*".

[101] Safe WorkSA (14 February 2014) Media Statement "*SafeWork SA investigating bogus inspectors*" viewed at: http://www.safework.sa.gov.au/uploaded_files/20140214BogusInspectors.pdf

b. "*SafeWork SA encourages employers or officials at workplaces to require proof of identity and to check the credentials of any unknown person seeking site access*."

130. Finally, the committee and government should consider the contemporary imperatives for employers to even more tightly control and monitor who is on their sites, along with the identity of visitors.

131. Greater workplace security is driven by diverse imperatives such as: national security, food security, risks of industrial espionage, and workplace health and safety, right through to protecting employees from violence. Such considerations have made employers increasingly vigilant in confirming and controlling who is coming onto site and what they do when they get there. This is part of a global trend to greater security and site control following 9-11.

132. It would be entirely consistent with this global trend towards greater control and identification of all persons in the workplace to require unions exercising powers of entry to show photographic ID.

Commencement dates

133. All the Bill's right of entry provisions, including the repeal of the worst aspects of the 1 January 2014 changes, have a scheduled commencement of not more than six months after the legislation receives Royal Assent. This is in contrast to other parts of the Bill that commence on or the day after Royal Assent.

134. The provisions repealing the 1 January 2014 changes can and should commence upon Royal Assent and apply to all entry notices served after that date. The longer the existing damaging Labor provisions remain in place, the more costly they will be to industry and the economy. We can see no reason for delayed commencement of those provisions.

AMMA's position on the union entry provisions

AMMA supports:

- Passage of those elements in Schedule 1, Part 5 that reverse damaging aspects of the *Fair Work Amendment Act 2013* that commenced operating on 1 January 2014.
- Amending Schedule 1, Part 5 to:
  - Require a union to be covered by an enterprise agreement onsite to gain right of entry for discussion purposes.
  - Preclude a union exercising right of entry for discussion purposes to a workplace that is covered by an agreement with another union or unions.
  - Enable invitation certificates to only be used to gain entry on non-agreement covered sites.
  - Provide appropriate safeguards on the role and operation of invitation certificates for union entry, as set out above.

AMMA also supports:

- All changes to union entry commencing as soon as possible.
- Additional requirements for union officials to carry photo ID.
- Amending the *Fair Work Act* to talk about "union entry" not "right of entry".

SCH 1 – PART 6 – FWC HEARINGS AND CONFERENCES

135. Part 6 of Schedule 1 of the Bill amends Part 3-2 of the Act to provide that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference, when determining whether to dismiss an unfair dismissal application under s.399A or s.587.

136. The 2015 EM (paragraph 128, p.21) indicates that "*the amendments in this Part implement Fair Work Review Panel recommendation 43*".

137. As a general principle, AMMA supports common sense amendments to the unfair dismissal system generally to improve outcomes for employer respondents whom expend considerable time and cost to defend matters, despite the weak merits or strength of some unfair dismissal claims.

138. AMMA supports these amendments which will hopefully reduce the capacity for an applicant to create unnecessary additional cost imposts on employers and the FWC's resources where an applicant has unreasonably failed to attend a conference/hearing, comply with a direction/order, or discontinue an application after a settlement agreement has been concluded.

139. Where a person feels aggrieved and exercises their right to make an allegation that triggers the costly machinery of the state, funded by the community (in this case the FWC), it is beholden on that person to attend and prosecute their case. Where that does not occur, the person should quite rightly lose access to the mechanisms they have triggered, noting that there are well-accepted mechanisms between parties for adjournment, delay and appropriate communication in regard to the smooth running of the jurisdiction.

AMMA's position on the unfair dismissal provisions

AMMA supports the passage of Schedule 1, Part 6.

PART C – AMMA's POST IMPLEMENTATION REVIEW SUBMISSION ON UNION ENTRY

Below is an extract from AMMA's October 2015 submission to the Australian Government's Post-Implementation Review of those Fair Work Act provisions that commenced on 1 January 2014. This includes the most recent amendments to the right of entry provisions of the *Fair Work Act 2009*, rendered by the *Fair Work Amendment Act 2013*.

This submission is directly relevant to union entry changes proposed in the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015,* which seek to:

- Repeal amendments made by the *Fair Work Amendment Act 2013* that require an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations.
- Provide for new eligibility criteria that determine when a permit holder may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers.
- Repeal amendments made by the *Fair Work Amendment Act 2013* relating to the default location of interviews and discussions and reinstating pre-existing rules.
- Expand the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.

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1. Union access to workplaces has consistently rated as one of the top, if not the top, concerns of AMMA members since the Fair Work Act took effect on 1 July 2009.

2. AMMA foresaw the problems that would be created by the 2009 and 2014 changes to union entry laws and called them out. But our concerns were not heeded, and we have since seen those problems come to pass.

3. The Fair Work Act's original changes in this area have only become more problematic for employers with the further expansive changes made to union access (right of entry) effective as of 1 January 2014.

4. Those changes fall into three main areas:

    a. Location of union interviews and discussions.

    b. Facilitation of accommodation and transport in remote areas.

c. Frequency of entry for union discussions.

5. AMMA notes that the first two areas above of changes under the Fair Work Amendment Act 2013 were intended to be repealed by the Fair Work Amendment Bill 2014.

6. That Bill, in line with the *Coalition's policy to improve the Fair Work laws*, released in the lead-up to the 2013 federal election, sought to repeal the provisions relating to the location of union interviews and discussions and the facilitation of accommodation and transport in remote areas.

7. Unfortunately, in order to get any of that Bill through parliament, the government had to do a deal with Senate cross-benchers which saw the complete removal of the union access repeal provisions of the Bill. This was despite the government having a clear mandate to repeal those provisions by unambiguously signalling its intention to do so prior to the last federal election.

8. In addition to removing the 1 January 2014 Fair Work Act amendments relating to lunch rooms and remote sites, the above Bill also sought to amend the basis of entry for discussion purposes according to whether the union was covered by an enterprise agreement onsite.

9. If a union was covered by an enterprise agreement, it could have, under the Bill, continued to enter sites based on the current Fair Work Act rules. However, if a union was not covered by an enterprise agreement onsite, its officials would have to be invited in by a union member or prospective member to hold discussions. A new system of "invitation certificates" would have applied if an invitation was in doubt, had the Bill passed with those provisions intact. Unfortunately, that did not happen.

10. AMMA now looks to the current PC and to this post-implementation review to ensure such changes are enacted in future, along with further necessary reforms as outlined by AMMA in our submissions on these issues to date.

11. While the PC has made two draft recommendations regarding union access to workplaces, these do not go as far as the changes in the Fair Work Amendment Bill 2014, and do not go nearly far enough in relation to AMMA's suite of proposed reforms.

12. To be absolutely clear, AMMA considers the current union entry provisions of the Fair Work Act, which are the product of both the 2009 and 2014 amendments, to be flawed, unbalanced, open to abuse, and encouraging of disputes. Change in this area is desperately needed.

Location of union interviews and discussions

13. Schedule 4 of the Fair Work Amendment Act 2013, which became the new s492 of the Fair Work Act on 1 January 2014, states that a union permit holder must conduct interviews or hold discussions in the rooms or areas of a premises agreed with the occupier.

14. If the permit holder and occupier cannot agree on a location, the lunch room or crib room becomes the default meeting place.

15. This means that under the current legislation, it is no longer permissible for employers to designate a reasonable onsite meeting place for unions to hold discussions with employees under s484 of the Fair Work Act. This represents a huge winding back of employers' control of third-party intrusion onto their premises that existed prior to 1 January 2014, and which was working appropriately and without disputes and queries in most situations (it should be noted, however, that this was in the context of a vastly increased number of entry requests to resource industry workplaces on the back of the Fair Work Act coming into effect on 1 July 2009).

16. Under the pre-1 January 2014 legislation, employers were able to designate "reasonable" meeting locations, which could be challenged by unions on the grounds they were not fit for purpose.

17. Key among AMMA members' concerns with how these 1 January 2014 changes are playing out is freedom of association and the need to protect employees who have no desire to meet with unions during their meal breaks.

18. Since their introduction, AMMA has seen first-hand the observable effects of those lunch room changes, key of which have been a significant increase on the regulatory burden for employers and occupiers and an intrusion into employees' private time.

19. The lunch room provisions are a major issue for employers and, in the past 18 months of operation, have caused substantial diversion of time and financial resources, above that which must always be devoted to facilitating union choices to enter worksites under our workplace relations laws.

20. The case law is still playing out in this area in terms of how it is to be decided exactly which lunch room unions have access to and exactly what constitutes a failure of an employer and union to agree on a location in the first instance. This is illustrative of the type of concern that could have been addressed were the 2014 amendments not rushed through.

21. While the legislation does not require unions to be given access to every single lunch room on a worksite, that is exactly how unions are interpreting it and that is how they are approaching employers in the resource industry when seeking to hold discussions with employees.

22. AMMA's primary position remains that the 2014 amendments under examination in this review should be reversed. Removing the latest changes would be a return to a relatively settled area of law (although by no means ideal) and would mean less uncertainty for the parties involved and less resources required to be expended by employers.

23. AMMA maintains that allowing the employer to designate a reasonable location would be a return to a system that incurred fewer disputes and entailed less uncertainty, but importantly had an avenue for a union that felt aggrieved or unduly restricted in meeting with employees to seek redress through the FWC.

Absence of agreement

24. The new s492 of the Fair Work Act states that the permit holder must conduct interviews or hold discussions in the rooms or areas agreed with the occupier of the premises.

25. However, in the event that a permit holder and occupier cannot agree on the room or area, the permit holder may conduct the interview or hold discussions in any room:

    a. In which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and

    b. That is provided by the occupier for the purpose of taking meal or other breaks.

26. While the legislation only affords access to a lunch room in the absence of agreement between the parties, unions are commonly not even trying to reach agreement or discuss an alternative location.

27. They are going straight onto resource industry worksites and saying 'we've got a legislated right to use the lunchroom and we will not even entertain a discussion with you about an alternative location', even though that alternative may be even more fit for purpose and appropriate, and provide access to greater numbers of employees and potential union members.

28. Which particular lunch rooms the unions seek access to depends entirely on the purpose of their visit at the time – if they are embarking on a recruitment campaign they will want access to the greatest number of employees that are not their members, often afforded by access to the main lunch room.

29. If they are there for bargaining purposes, they tend to want greater access to their existing members and will choose a location accordingly. If the entry is part of a more general campaign to cause workplace friction, they will choose the location that is the least convenient to the employer / occupier and most problematic and undesirable operationally.

30. To say that the current provisions are not furthering the aims of productive and co-operative workplace relations is an understatement, particularly with regard to the wishes of employees. The provisions have encouraged greater disputation and reduced consensus on the location of discussions, which is directly contrary to the principal objects of the Act and the emphasis on not only a "balanced framework" but also "co-operative" workplace relations.

31. It is most definitely not the case that the lunch room amendments have been successful in preventing disputation. That would be to misunderstand not only the effect of the Fair Work Amendment Act 2013's provisions but also their intention, which was always to give a leg up to unions in relation to their recruitment drives, and a right to force an outcome on employers (and to reward union belligerence about where discussions should take place).

32. Union access to workplaces is in many ways inherently confrontational. Union officials, when they come onsite, have a vested interest in creating the impression amongst employees that there is a problem and the employer is not doing the right thing by them.

33. Unions need to create problems in order to give themselves a theatre in which to demonstrate their wares and give the impression the employer is trying to hide something. This means that union permit holders' interactions with employer representatives, their own members and non-members are often confrontational and aggressive, and this is not something most employees want anything to do with.

34. As an aside, this belligerence and operating style is just one of the factors that has seen trade union membership in the private sector fall to just 11% on the most recent data[102].

Employee wishes being ignored

35. What should have been one of the most important considerations was strikingly absent from the flawed regulatory impact process for these amendments, namely what employees want. It is employees that are the targets of union

[102] Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2014*, published on 27 October 2015, Catalogue number 6333.0

recruitment drives and their preferences and interests should be properly taken into account.

36. Many of the complaints about the operation of the new lunch room provisions are coming from employees who want to have their lunch in peace and not be confronted by angry union officials.

37. Employers are often caught between the wishes of their own employees who do not want to buy what unions are selling and who ask their employer not to expose them to union propaganda, and the wishes of the union officials who insist on having access to any and all lunchrooms right off the bat (and are given an artificial leg up by unbalanced union entry laws).

Unique circumstances of the resource industry

38. Resource industry workplaces operate in very unique circumstances. Worksites can cover many hectares and there are often multiple different places where employees have their lunch. Those lunch places can be underground, above ground, even up in the air. In our industry, there will be all sorts of places where people have their lunch and unions are insisting upon access to them without considering the views of employees, the nature and management of the worksite, or the hazardous nature of access.

39. Employers can and do push back against union requests where such requests are not in line with the legislative provisions or would be dangerous to the permit holders or others. However, that does not stop union officials disputing those decisions and putting employers and occupiers to the time and expense of responding to Fair Work Commission (FWC) applications to resolve disputes over the correct interpretation of the new requirements.

40. A very serious issue raised by the current legislative provisions is the fact that some crib rooms are located underground or in other locations in which safety management is challenging, a foremost concern and tightly controlled.

41. While a number of AMMA members have managed to say those are not appropriate meeting places even in the face of union resistance, the legislation on the face of it empowers unions to access those rooms in theory even if not feasible in practice.

42. There are also legally controlled areas such as quarantine restrictions on several major resource projects which must be managed strictly in relation to each and every visit.

43. While AMMA by no means agrees this is the case, the legislation should not even arguably extend unions' "right" to enter workplaces to lunch rooms:

a. on the "air side" of an airport, to which access is tightly controlled under aviation and national security legislation.

b. in tightly security-controlled areas, perhaps for the manufacture, storage or use of explosives, cheque or note printing, or for the protection of secure data.

c. Where there is no public access for very sound reasons (such as a women's refuge, mental health facility, prison, etc).

Operational impacts of lunch room provisions

44. Prior to the 1 January 2014 lunch room access provisions taking effect, there was already an onus on employers and occupiers to designate a reasonable meeting place that was fit for purpose. It was always open to unions to challenge the reasonableness of those locations, and the FWC could make orders that access be granted to particular rooms where warranted. AMMA can see no inherent unfairness in automatically returning things to the way they were.

45. In AMMA's, view the "reasonableness" test that preceded the 1 January 2014 changes was effective in that it ensured unions were not relegated to sauna-like facilities 10kms from where workers were located, but that employers could designate appropriate locations based on operational needs, employee convenience and comfort. To go to one of the preceding examples, in an airport or perhaps at the mint, the employer could designate a room for union meetings that did not raise security or operational concerns.

46. The employer / occupier is unquestionably best-placed to do this.

47. Where an employer was trying to game the system and manipulate the location to make it unattractive or inaccessible to employees, or was seeking to supervise or intimidate the union official, a complaint could be taken to the FWC.

48. The following actual experience applying the current entry rules amply demonstrates the operational difficulties and inherent problems with the current default lunch room provisions given that they divert valuable time and resources away from the business at hand and towards resolving such disputes because the legislation is open to interpretation.

Which lunch rooms are unions entitled to access?

49. In a real life example of union entry detailed in AMMA's reply submission to the PC's draft report, one AMMA member running a large mine site received a multitude of entry notices from numerous union officials in early 2014.

50. The union was, upon request, given access to the main crib room after which one of the workers complained their lunch break was disrupted by a union official talking loudly across the meal room (this is a not uncommon occurrence and as mentioned it is employees who often mostly strongly object to union proselytising during their meal breaks).

51. The union had previously objected to the meeting room the employer had designated and this had led the employer to give the union access to the main crib room in the employee amenities building. This was a meal room that fulfilled the requirements of the Fair Work Act under s.492.

52. Subsequent correspondence from the union demanded access to three other meal rooms on the site. When the employer refused, maintaining that the main crib room met the legislative requirements, the union raised a dispute under s.505 of the Act.

53. The employer maintained the main crib room was in fact the only meal room onsite that could be accessed by all employees and was therefore the most appropriate and amenable location for the union. Other crib rooms required employees to have specific area inductions (ie access was controlled for security, safety and operational reasons).

54. The main crib room was also the largest and best equipped facility for employee meal breaks onsite, comfortably seating more than 60 employees at a time.

55. All crib huts outside the main area complex required a visitor to be escorted and supervised at all times. The closest crib room was more than 300m from reception and required an escort across active roadways carrying heavy vehicles involved in mining operations. That smaller crib room also had only three tables compared with nine tables in the main crib room.

56. The furthest crib room was more than 2km from reception and required motor transport through heavily utilised roadways adjacent to the open cut mine. An appropriately qualified and dedicated driver would be required to remain with the union officials (as with all other visitors) at all times, unlike in the main crib room.

57. Given that two union officials were visiting the site on an almost weekly basis for five hours each time, the resources required to escort and supervise those entries outside the usual arrangements would have been prohibitive and unreasonable.

58. There were also valid and specific operational and safety concerns raised by the union's demands to access the other crib rooms. In some cases those crib rooms were adjacent to heavy vehicle operations, active mining activities including blasting, areas where dangerous substances were being used, where

exploratory drilling was taking place and in one case next to the primary explosives magazine.

59. In that particular case, the union threatened to take the matter directly to the Federal Court seeking an injunction to allow it access to all lunch rooms on the site, but this did not eventuate, presumably because the union did not want an adverse finding against it that would jeopardise future demands.

60. However, following the union's indication it would pursue court action, the business undertook a lot of preparatory work which involved third parties visiting the site, interviewing witnesses and preparing statements, becoming familiar with the facilities and company policies and drafting submissions.

61. A law firm was also briefed in anticipation of court proceedings.

62. Notwithstanding preliminary costs for the business of $30,000, the union simply did not proceed with the matter. As it turned out, the employees at that site voted to approve the employer's proposed enterprise agreement (which had been the purpose for the bulk of union visits) contrary to the union campaign against it.

63. Given the current legislation's openness to disputation, as the above example shows, AMMA maintains that the provisions implemented on 1 January 2014 requiring employers to facilitate union access to employee lunch rooms in lieu of agreement on another location are operating deficiently, represent a backward step from the previous regulation on union entry, and should be removed.

64. The pre-1 January 2014 provisions that allowed employers to designate reasonable meeting locations should be re-legislated and this would be very easy to do.

Refusals to reach agreement

65. A Qld-based AMMA member reports a distinct campaign by unions to access 25 smaller lunch rooms of various sizes across its plant rather than the one "canteen" lunch room.

66. That member reports that unions are deliberately creating a dispute and making no effort to agree on a reasonable alternative venue with the occupier.

67. To date, that member has given union officials access to seven different lunch rooms for the purpose of discussions with members in the context of upcoming EBA negotiations. Previously, unions might only have visited once every four or five months but during EBA negotiations that ramped up considerably.

68. In these cases, unions flatly refused to discuss alternatives and simply said access to any and all lunch rooms was their "legislated right".

69. The maintenance area of the plant, where some of the lunch rooms are located, is not the safest place to send visitors.

70. The company had been using an open air park onsite for the past six years for union meetings until the new laws came into effect on 1 January 2014. From then on, unions refused to use that outdoor space despite never having objected to it before.

71. At that single company, one person has had to devote an entire week of time recently to dealing with just one issue – union entry.

72. That company deals with three unions onsite who all want access to different crib rooms and each person visiting the site is required to have their own escort. That means if three officials come at once, three people are required to escort them.

73. These visits are all taking unnecessary time away from doing business, with onsite staff spending two hours on the phone every day for each union visit, not including other resources having to be devoted to such visits.

Examples of unsafe union behaviour

74. A recently published decision graphically demonstrates the scenarios that employers / occupiers are dealing with in terms of union visits to remote or inaccessible workplaces.

75. A case involving the CFMEU was subject to a decision by Commissioner Anna Booth in September 2014[103].

76. While the case was decided under s.505 of the Fair Work Act, contrary to the overwhelming majority of cases decided under that section, the dispute was not about the reasonableness of requirements to use particular rooms, the coverage of employees by a particular union or the right of entry provisions of industrial agreements. It instead concerned how particular named CFMEU officials should conduct themselves in future entry visits in light of past conduct.

77. Not related to the default lunch room provisions in particular, CFMEU officials were exercising their rights to enter to investigate alleged breaches under the Fair Work Act and the Qld Work Health & Safety Act as it stood at the time.

[103] *Bechtel Construction (Australia) Pty Ltd; Bechtel Australia Pty Ltd v CFMEU and Ors* [2014] FWC 5900, 18 September 2014

78. The FWC's decision demonstrates the types of behaviours employers and occupiers are having to deal with from union officials, all at a time when union access to all parts of a worksite, no matter how remote, is being expanded.

79. In this particular case, the CFMEU officials:

a. Avoided normal entry requirements that were in place for reasonable OHS purposes;

b. Walked on roads when it was dangerous to do so, including the heavy vehicle "haul road";

c. Left their escorts;

d. Conducted meetings at times and in places they were not authorised to do so;

e. Claimed to have permits they did not have;

f. Abused company employees;

g. Entered places without proper authority;

h. Entered places in dangerous ways; and

i. Removed protective equipment they were required to wear.

80. As the commissioner noted in her decision:

> *"The arrival, unannounced, of individuals at Curtis Island, a complicated construction site comprising three large, separate projects, whether by ferry or private vessel, is itself a major OHS issue. [The company] had every reason to know who is onsite and where they are to ensure safety."*

81. The company's standard safety procedures included:

a. Travel to and from the mainland by ferry provided for the purpose of transporting employees and visitors;

b. Signing in and being issued with a visitor's pass at the security office at the ferry dock on the mainland;

c. Undertaking a visitor's safety induction at the ferry dock on the mainland;

d. Being ferried across, under escort, to the ferry dock at the QCLNG project on Curtis Island, where they are met by either a member of the company's workforce services team or another staff member;

e. Being required to wait in an office area until they are escorted to the areas of the project they wish to visit; and

f. Being escorted off the island and departing in the same way they arrived when they finished their visit.

82. Contrary to those requirements, which the commissioner found entirely reasonable, particular CFMEU officials were alleged to have:

a. Travelled to Curtis Island by private vessel, including skippering one of the journeys;

b. Failed to comply with OHS requests;

c. Walked on the haul road which the commissioner noted was "potentially dangerous and carries mainly heavy vehicles with strict controls over light vehicles entering the road, prohibited to pedestrian traffic and marked as such with signs";

d. Proceeded on foot into the construction site;

e. Walked unescorted and without authority to be on the site;

f. Conducted a meeting under s.484 outside of normal meal breaks;

g. Spoke on mobile phones contrary to good OHS practice;

h. Caused disruption by directing employees to cease work;

i. Examined a crane with the engine running;

j. Proceeded without an escort into areas where earthmoving was taking place in an unsafe way;

k. Ignored warnings and reasonable requests.

83. According to the commissioner, aspects of the union officials' conduct had "all the hallmarks of stunts".

> *"They were arranged by the CFMEU off the back of sub-branch meetings that brought a large number of officials to Gladstone. It seems no coincidence that amateurish entries were staged, one complete with private vessel, by officials who should have known better, conducting themselves unconventionally or even improperly."*

84. This type of behaviour, for which AMMA notes the punishment meted out by the FWC was that union officials undergo further training, underscores the need for the repeal of all of those aspects of the Fair Work Amendment Act 2013 that expanded union entry rights to areas of worksites not designated as appropriate by the employer, and to remote or inaccessible sites, as outlined further below.

Accommodation and transport in remote areas

85. Division 7 of Schedule 4 of the Fair Work Amendment Act 2013 enacted never before legislated provisions requiring occupiers to facilitate union officials' accommodation and transport arrangements to enable them to visit worksites in remote areas.

86. The types of sites potentially affected by those provisions include predominantly resource industry worksites not only in the middle of a body of water but also onshore in remote, desert-like locations, which are just as complex to manage from an operational perspective.

87. Under the new s521C(2) of the Fair Work Act, in situations where unions and occupiers are unable to agree on accommodation and transport arrangements, employers are required to facilitate access by providing said transport and accommodation.

88. Section 521D(1) of the Fair Work Act imposes an obligation on occupiers to provide the commercially available transport that it has arranged for its own workers and extend that to the union.

89. The plethora of safety issues associated with union access to remote sites includes that infrequent travellers require escorting on all offshore platforms and helicopters to ensure their safety at all times. This is a further distraction requiring extra resources to be diverted while at the same time opening up the occupier to significant risk and liability.

90. Offshore and onshore resource worksites in remote locations are often also major hazard facilities. Visitors are a liability in emergency response situations and this is something employers have to factor in for each and every workplace visit. They need to be especially vigilant regarding union visitors who often do not obey instructions and are prone to walking off on their own to investigate.

91. AMMA's submission to the Senate inquiry into the Fair Work Amendment Bill 2013 when it was before parliament outlined in detail AMMA's concerns about the remote site provisions.

92. While there has not been a large documented increase in requests for remote site visits via employer-facilitated transport and accommodation, AMMA and its members remain opposed to these provisions and maintain they should be removed in line with the government's pre-election policy, and as the Fair Work Amendment Bill 2014 in its original form sought to do.

Does the union have to pay?

93. In a recent example, union officials were seeking access to an offshore resource project in Western Australia.

94. Such a visit would have required by law an escort by the local port authority in addition to the company's site access requirements. The port authority would charge a fee for the escort.

95. The union maintained the company was required to pay that fee to facilitate the union's access to the offshore site. Nowhere in the legislation does such a requirement exist, but this demonstrates the lack of clarity around Labor's laws, including around the respective obligations on employers and unions, thus further supporting the removal of the provisions.

96. All the concerns AMMA predicted remain live considerations, and the relatively small number of official requests for transport and accommodation are more a function of scarce union resources, well-managed remote site operations and the significant fall-off of new resource project work than anything else.

97. AMMA maintains that union access to remote sites is impractical and often dangerous and that access to workers can easily be facilitated when workers are en route to those locations, such as at a heliport or wharf.

98. We also note there was to be an exchange of monies between unions and employers for said transport and accommodation where employers were providing their own transport and accommodation to union officials:

    a. There was discussion of the publication of a schedule of fees when the legislation was enacted by the former Labor government which has never come to pass, and in relation to which there has never been any consultation with AMMA or other employers that we are aware of.

    b. Employers were (and remain) very concerned at their capacity to recoup the full costs incurred in providing transport and accommodation to union officials.

    c. It remains a concern that costs will be disputed by unions.

d. In the example referred to earlier, unions are sometimes attempting to insist that employers are required to foot the bill for their expenses incurred in relation to remote site visits.

e. We have seen during the course of the Heydon Royal Commission the risks and hazards that are created where unions and employers enter financial transactions and exchange monies. Our principal workplace relations legislation should not encourage or require unions and employers to financially transact with one another.