Australian Manufacturing Workers' Union's Submission

Senate Education and Employment Legislation Committee Inquiry

Fair Work Amendment Bill 2014

About the Australian Manufacturing Workers' Union

The AMWU's purpose is to improve members' entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents around 100,000 members working across major sectors of the Australian economy, in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding tertiary qualifications.

Executive Summary

- The AMWU calls on the Senate to reject the Fair Work Amendment Bill 2014 (the Bill).

- The Government gave clear commitments to the public before the election that it would not seek to take away employee entitlements through legislation and that it would not seek to bring back WorkChoices. The current bill goes far beyond this commitment and seeks to bring back key parts of the WorkChoices regime.

- The rules for Individual Flexibility Arrangements (Flexibility Terms in awards and agreements) are being amended so dramatically, that the "new Flexibility Arrangements" are in essence WorkChoices AWAs.

- The new rules cement a position of monetary benefits being exchanged for non-monetary benefits without employee protections. They also provide employer's with a defence against future litigation about the agreement. They require employees to sign what is essentially a guarantee for employers that the employee "genuinely needs the new Flexibility Arrangement" and that they believe it leaves them Better Off Overall.

- The Bill cherry picks from the Fair Work Review Panel Recommendations in the Coalition Election Policy and fails to implement Review Panel proposed employee protections, which include ensuring that the monetary benefit traded for a non-monetary benefit in the Flexibility Arrangement is proportionate, that the monetary value is quantified in writing and that the monetary value is relatively insignificant.

- The defence for employers against contravening the Act established by the Bill puts employees in a position where they are unable to pursue an employer subsequently when they realise that they have struck an unfair bargain, or were unaware that they were signing away their entitlements.

- Employees who are award reliant are predominantly casual 55% and part-time 65%, with 75% earning less than $18.60 per hour, meaning their bargaining position when it comes to employer initiated Flexibility Arrangements is already at a disadvantage. Employees who are award reliant on the minimum safety net of wages and conditions should be supported to maintain those minimum conditions, not put at a further disadvantage by employer initiated variations to their penalty rates and hours of work.

- Even under the current Flexibility Terms, there is evidence that employers have attempted to force employees to sign Flexibility Arrangements as a condition of employment or ongoing employment. Rather than giving more power to the employer, the focus should be on reforming these Flexibility Terms to protect against employer abuse.

- The Bill's removal of annual leave loading as an entitlement on termination is a small and petty attack on employee entitlements that currently exist, particularly for employees who are changing or losing their job in a transitioning economy.

- Changes proposed to Right of Entry rules are premature, as the most recent changes have only come into effect as of 1 January this year. The effect of the proposed changes will also make it more difficult for employees to access union representatives when they need to.

- Finally the changes to approval for Greenfield Agreements (new projects) essentially puts employers in a position where they can dictate the terms of employment at a new project and sideline employee representatives.

Introduction

1. The Senate has referred the Fair Work Amendment Bill 2014 (the Bill) to the Senate Education and Employment Legislation Committee for inquiry. The Australian Manufacturing Workers' Union's (AMWU) members support laws that promote fair pay and conditions of work. The AMWU makes the following submissions to the inquiry.

2. The Bill has a number of proposed amendments to the Fair Work Act 2009 (the Act) which will promote unfair work practices and reduce employees pay and conditions at work. This submission will draw attention to the amendments which have the greatest impact on employees which are proposed by the Bill. In particular, it will focus on amendments to the following areas:

    a. Individual Flexibility Arrangements

    b. Annual leave loading

    c. Right of Entry

    d. Greenfields Agreements

3. The AMWU is an affiliate of the Australian Council of Trade Unions (ACTU) and wholly supports the ACTU's submissions.

4. The AMWU calls on the Senate to reject the Bill because:

    a. The Bill does not faithfully implement the Coalition's pre-election policy and goes far beyond what the Coalition committed to;

    b. The Bill attempts to reintroduce WorkChoices style individual agreements by establishing a framework for new Flexibility Arrangements that protect employers from litigation where they have undermined an employee's workplace entitlements;

    c. The Bill removes a current workplace entitlement to annual leave loading on termination;

    d. The Bill introduces a cumbersome and overly complicated process for employees seeking to speak to their union at convenient break times at their workplace; and

    e. The Bill hands near complete control to employers to set the wages and conditions of employment at new projects "Greenfield Agreements," sidelining and reducing the bargaining position of unions who are the employee bargaining representatives.

The Coalition's election policy and commitments

5. The *Fair Work Amendment Bill* 2014 is described in the Second Reading Speech as delivering key aspects of the Coalition's election policy and "does not go any further."[1]

6. This statement in the Second Reading Speech is in accordance with the statements by the Coalition before the election. The then Opposition Leader, the Hon. Tony Abbott MHR had promised before the election that employee entitlements would be protected if the Coalition

[1] The Hon. Christopher Pyne MP, *Second Reading Speech, Fair Work Amendment Bill* 2014, 27 February 2014 House of Representatives.

won government. Launching the Coalition's election policy with the then Shadow Minister for Employment and Workplace Relations, Senator Eric Abetz, Mr Abbott answered questions at the press conference about the Coalition's election policy in the following direct unequivocal terms.

QUESTION: Will you be tinkering with unfair dismissal laws and will you be winding back penalty rates?

TONY ABBOTT: The short answer is no to both questions.[2]

7. Eric Abetz at the same press conference in response to a question about WorkChoices said the following unequivocal statements:

ERIC ABETZ: Can I just add to that answer, Bill Shorten put out a list of four questions on the 1st March and said they were the four questions that Tony Abbott had to answer and they are these:

Will Tony Abbott guarantee he won't rip away unfair dismissal protections? Answer: Yes.

Will Tony Abbott guarantee he won't rip away the right to request family friendly arrangements? Answer: Yes, and what is more, under our individual flexibility arrangements suggestion or policy, that will in fact be enhanced.

Thirdly, will Tony Abbott guarantee he won't rip away penalty rates? Answer: Yes.

Will Tony Abbott guarantee he won't rip away rest breaks and long service leave? Answer: Yes.[3]

8. This year, the Prime Minister confirmed again, that penalty rates would be left to the Fair Work Commission and that no legislative changes would be made to impact penalty rates.

QUESTION: Do you think that penalty rates should be reduced?

PRIME MINISTER: I think that these matters are properly the preserve of the Fair Work Commission and that's always been our position and that always will be our position.

QUESTION: Why didn't you go to the election and let voters know beforehand that you might be changing the rules, or attempting to change the rules, after you got into power?

PRIME MINISTER: But that's not correct. This is a matter for the Fair Work Commission. Wage rates, penalty rates, all of the conditions of employment under awards are a matter for the Fair Work Commission. That's the case now, that was the case before the election and that will continue to be the case.

QUESTION: But you're leaning on them, Prime Minister. You're leaning on the Fair Work Commission to perhaps go in a direction that, whilst you mightn't admit to it, that's the underlying nature of what you're doing.

PRIME MINISTER: Not true. We think that these matters should all quite properly be determined by the independent umpire and that's as it should be.[4]

---

[2] Transcript, Press Conference, *Launch of the Coalition's Policy to Improve the Fair Work Laws,* Leader of the Opposition the Hon. Tony Abbott MP and Shadow Minister for Employment and Workplace Relations, Senator Eric Abetz, 9 May 2013.
[3] Transcript, Press Conference, *Launch of the Coalition's Policy to Improve the Fair Work Laws,* Leader of the Opposition the Hon. Tony Abbott MP and Shadow Minister for Employment and Workplace Relations, Senator Eric Abetz, 9 May 2013.

9. In addition to being assessed for its impact on employee's work rights and entitlements, the current legislation before the Parliament, must also be assessed against these clear pre-election guarantees made by Mr Abbott and Mr Abetz. Mr Abbott's now infamous statement that WorkChoices is "dead, buried and cremated," is also enlivened by an assessment of the Fair Work Amendment Bill 2014.

The Coalition's new Individual Flexibility Arrangements (new Flexibility Arrangements) – the new AWA

10. The Bill, Part 4 includes four key elements which amend the current rules for Individual Flexibility Arrangements. These changes dramatically change the operation of Flexibility Arrangements and in essence result in the introduction of WorkChoices AWAs by stealth.

11. For clarity, the current Individual Flexibility Arrangements will be referred to as the "current Flexibility Arrangements", whilst the Bill's proposed Individual Flexibility Arrangements will be referred to as the "new Flexibility Arrangements."

12. The key provisions addressed in this submission which affect the Flexibility terms in Awards and Enterprise Agreements and which would govern the "new Flexibility arrangements" are:

    a. a legislative note that allows "new Flexibility Arrangements" to allow for monetary benefits to be exchanged for non-monetary benefits without caveat;

    b. an employer defence against future claims that they breached the award or agreement by entering into a "new Flexibility Arrangement";

    c. a genuine needs statement which results in employees waiving their rights when they enter into the "new Flexibility Arrangement"; and

    d. forcing enterprise agreements to include matters that can be the subject of "new Flexibility Arrangements" which are not agreed between the employer and employees collectively.

13. The other element which is not addressed relates to extending the time for terminating the new Flexibility Arrangements. This applies to the current Flexibility Arrangements in awards and so it not a significant change.

Allowing award conditions to be traded away

14. The Bill will insert a legislative note that expressly confirms that the "new Flexibility Arrangements" can provide for monetary benefits to be traded away for non-monetary conditions. The Coalition's election policy was deliberately deceptive when it identified that it would be implementing Recommendation 9 of the Fair Work Review Panel's Report.[5] Recommendation 9 reads as follows:

    "*The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the*

[4] Transcript, Joint Press Conference Prime Minister with Steven Marshall MP, South Australian Opposition Leader, Adelaide, 5 February 2014.
[5] "The Coalition's Policy to Improve the Fair Work Laws," May 2013 at p36

monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate."

15. The Recommendation's requirements include: that the value of the monetary benefit is quantified "in writing" and be "relatively insignificant" and "proportionate" to the non-monetary benefit. These are very strong protections for employees which the Government has not implemented through the FWA bill 2014 and has chosen to exclude from their "new Flexibility Arrangements".

16. Putting an express note in the legislation that monetary benefits can be exchanged for non-monetary benefits also places employees particularly employees with no legal training in a weakened bargaining position.

17. The Parliament must hold the Government to its commitments in the statements referred above. The Senate should reject the bill because it goes beyond the Government's mandate. If the Government's Bill is to fulfil its intention, then it should implement the entirety of the recommendation, including employee protections or it should not be passed at all.

Protecting employers from having to comply with Awards

18. The Coalition's election policy identified that it would implement recommendation 11 of the Fair Work Review Panel's Report[6]. However, the bill only implements Recommendation 11 without implementing the accompanying recommendation 10. This may be justifiable if the recommendations were independent and distinct from each other. Notwithstanding, Recommendation 11 expresses a clear intention to be implemented alongside recommendation 10 and reads as follows:

"The Panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met."

19. The Coalition's intentional exclusion of recommendation 10, in effect excludes the protection for employees against abuse in the proposed "new Flexibility Arrangements" by employers exercising their bargaining power over individual employees. Recommendation 10 reads as follows:

"*The Panel recommends that the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.*"

20. The Bill does not implement the intention expressed in the Coalition's policy document. Instead the Government has cherry picked the parts which assist it in returning to a system of individual agreements which undermine the award safety net of wages and conditions and in particular penalty rates. These "new Flexibility Arrangements" will not be subject to the Fair Work Ombudsman's oversight as envisaged by the recommendation, instead an employer will be able to rely on their "reasonably held belief," that they were compliant and provide the proposed "genuine needs statement" from the employee as evidence of their belief.

[6] "The Coalition's Policy to Improve the Fair Work Laws," May 2013 at p36

21. Providing employers with a defence against subsequent action by an employee, a union or by the Fair Work Ombudsman, without requiring the employer to submit the proposed "new Flexibility Arrangements" to a third party places the employee in a weakened bargaining position where they cannot subsequently rely on the expertise of the FWO to verify that their bargain was fair. Further, with the "genuine needs statement" addressed below, an employer can undermine award conditions, such as by removing penalty rates without fear of repercussions.

Employee "genuine needs statement"

22. Instead of allowing the Fair Work Ombudsman to receive the "new Flexibility Arrangements" and to investigate them where there appears to be systemic abuse, this Bill presented by the Coalition Government to the Parliament introduces for these "new Flexibility Arrangements" a concept of a "genuine needs statement."[7]

23. The Explanatory Memorandum explains that this "genuine needs statement" is supposed to provide comfort for employees and employers that the arrangement being entered into is meeting the needs of the employee and is Better Off Overall when compared to the underpinning enterprise agreement or award.[8]

24. The Explanatory Memorandum goes further and identifies that this "genuine needs statement" could be used as evidence of the employee's state of mind at the time that the individual flexibility arrangement was agreed to and may be relevant to assessing the reasonableness of the employer's belief that it had complied with those requirements for the purposes of new section 145AA."[9]

25. New section 145AA is the new defence for an employer being inserted to implement recommendation 11 of the Fair Work Review Panel's report (discussed above). This means that the "genuine needs statement" will give the employer evidence of their defence against a claim that they had breached the term of an award and therefore should be fined.

26. The employee's "genuine needs statement" will only be subject to an employee's non-legal expertise and without the system wide perspective the Fair Work Ombudsman has to be able identify systemic abuse or exploitation of any loopholes in relation the new Flexibility Arrangements.

Enterprise Agreement Flexibility Arrangements

27. Equivalent provisions in the Bill provide for Flexibility terms in Enterprise Agreements to be affected by the "legislative note allowing the exchange of monetary for non-monetary benefits,"[10] the "genuine needs statement"[11] and the accompanying "employer defence."[12] These establish the key elements of the "new Flexibility Arrangements" in enterprise agreements.

28. The FWA Bill 2014 also mandates that the Flexibility term in Enterprise Agreements must allow for the "new Flexibility Arrangements" to be about: arrangements about when work is performed; overtime rates; penalty rates; allowances; and leave loading.

---

[7] Schedule 1, Part 4, Division 1, item 6 of the *Fair Work Amendment Bill* 2014
[8] Paragraph 28 and 29 of *the Explanatory Memorandum to the Fair Work Amendment Bill* 2014
[9] Paragraph 29, of *the Explanatory Memorandum to the Fair Work Amendment Bill* 2014
[10] Schedule 1, Part 4, Division 3, item 13 of the *Fair Work Amendment Bill* 2014
[11] Schedule 1, Part 4, Division 3, item 14 of the *Fair Work Amendment Bill* 2014
[12] Schedule 1, Part 4, Division 3, item 18 of the *Fair Work Amendment Bill* 2014

Who are employees who are Award reliant?

29. Many employees rely solely upon the relevant award for the entirety of their pay and conditions. Such "award reliant" employees have little or no bargaining power. According to the Workplace Research Centre, 55% of all casual employees, 61% of all female employees and 65% of all part-time employees, rely solely upon the award. .[13] 75% of all award reliant employees earn less than $18.60 per hour -. the rate paid to a C10 or "base trade" employee under the MA10 award[14].

30. Employees who are casual and part-time, earning award wages need to have their weak bargaining position protected and if possible strengthened so that their already minimum wages and conditions are not whittled away even further. The Government's Bill undermines the bargaining position of all employees, but it renders award reliant employees even more susceptible to unfair bargains dictated by employers.

Undercutting the Employee's negotiating position

31. It is likely that the so called "genuine needs statement" will be just another form which the employer will put in front of an employee to sign when they are asked to have their position changed in return for the removal of penalty rates, overtime rates and other leave entitlements.

32. An employee who is called into an employer's office and asked to sign one of these "new Flexibility Arrangements" is in a much weaker bargaining position than if they were not required to essentially waive their rights away by signing a "genuine needs statement." In one transaction, the employer secures both a reduction in an employee's monetary entitlements, and also secures from the employee a guarantee that the employer can use in their defence in future litigation.

33. Under the current Flexibility Arrangements that exist in an award if the arrangement does not meet the requirements, particularly in relation to the Better Off Overall test, or in relation to coercion or duress it can be terminated, however an employee can also seek to have fines imposed on the employer where there is evidence of coercion or duress and where the employer is purposely attempting to undercut penalty rates.

34. There is no requirement that employees be informed that they can provide these new Flexibility Arrangements to their union for advice or have any cooling off period. There is no requirement that an employer provide an employee with a notice that they are not required to sign or agree to the new Flexibility Arrangements as a condition of ongoing employment. It is also unclear whether the requirements that apply in relation to coercion or duress as described in the current Flexibility Arrangements would apply to the "genuine needs statement."

35. Research conducted by the Fair Work Commission and identified in a Full Bench Decision of the Fair Work Commission on the current Flexibility Arrangements indicated an alarming number of employers who tried to get employees to sign the current Flexibility Arrangements to start employment or as a condition of ongoing employment, despite this not being allowed under the current rules. The Full Bench decision noted:

---

[13] Wright S and Buchanan J., "*Fair Work Commission Award Reliance Research Report 6/2013*", Workplace Research Centre, University of Sydney Business School, December 2013 at p67 - 68

[14] Base trade rate of C10, which is the standard classification in the Manufacturing and Associated industries and Occupations Award 2010.

"*In the employer survey conducted as part of the 2012 Individual Flexibility Arrangement Report employers were asked whether the employee was required to sign the Individual Flexibility Arrangement documentation in order to continue or commence employment. A majority of single Individual Flexibility Arrangement employers (69 per cent) with modern award Individual Flexibility Arrangements required the employee to sign the Individual Flexibility Arrangement documentation to either commence or continue their employment. Just over half of multiple Individual Flexibility Arrangements employe[r]s (54 per cent) required all employees to sign Individual Flexibility Arrangement documentation to either commence or continue their employment*."[15]

36. This is clear evidence that many employers will attempt where they can to strip away employee entitlements where they can or believe they can get away with it. The threat of non-ongoing employment by the employer puts the employee in an unfair bargaining position. The introduction of a so called "genuine needs statement" will simply further embolden many employers to try and enter with employees these "new Flexibility Arrangements" that undercut award conditions, but which provide protection for the employer against future action by the employee.

37. Employees on award wages and conditions are not in an equal bargaining position to employers. This attempt to undermine the employee's bargaining position is attempting to bring back the Australian Workplace Agreements (AWA)'s which existed under WorkChoices by stealth, whereby employees can sign away their entitlements and provide the employer with a defence against any future claims that they undercut the award safety net conditions.

38. These new Flexibility Arrangements which would be entered into are likely to be employer initiated, en masse and be targeted at removing penalty rate for unsocial hours, weekends, public holidays and overtime.

39. The Prime Minister's statement on the 5 February (above) was unequivocal in preserving the rules as they relate to penalty rates. In contrast to that statement this bill is attempting to introduce new rules which will allow employer's to use the "new Flexibility Arrangements" to strip back penalty rates.

40. The effect of what the Government may like to term minor amendments to the Flexibility Arrangements in effect result in a new system of Flexibility Arrangements which heavily advance an employer's bargaining position and weaken an employee's bargaining position.

41. The Senate should reject the Bill's proposed changes to the Flexibility Terms which govern Individual Flexibility Arrangements because they will undermine award safety net minimum conditions of employment and because they go far beyond the Coalition's mandate.

Annual Leave Loading

42. The Coalition's election policy identified that it would implement recommendation 6 of the Fair Work Review Panel Report.[16] This recommendation is described in the policy in a benign way, because at the time employers were still of the view that employees would not be paid annual leave loading on termination.

---

15 [2013] FWCFB 2170 at paragraph [74]

16 "The Coalition's Policy to Improve the Fair Work Laws," May 2013 at p36

43. Since the Coalition released its election policy the Fair Work Commission has determined that Awards which currently prevent Annual Leave Loading being payable on termination are inconsistent with the legislative minimum standard, the National Employment Standards, and in particular, section 90(2) of the *Fair Work Act* 2009.[17] The Full Bench in particular, when commenting on an employer application seeking to have annual leave loading not payable on termination, said the following:

"*To vary those modern awards as sought would create anomalies or technical problems having regard to the provisions of s.90(2) of the FW Act and their clauses dealing with payment of annual leave loading during annual leave*."[18]

44. The current entitlement for employees as determined by the Fair Work Commission is that leave loading must be payable on termination and awards which don't provide for leave loading payable on termination must be amended to provide for it.

45. Annual Leave Loading for employees covered by the *Manufacturing and Associated Industries and Occupations Award* 2010 (Modern Manufacturing Award) is an amount that is calculated based on the higher of either a fixed rate of 17.5% or shift loadings which might be payable.[19]

46. The current Modern Manufacturing Award is silent on whether annual leave is payable on termination. If the award is read in conjunction with the current section 90(2) of the Fair Work Act 2009 and the interpretation given by the Commission, then an employee must be paid on termination for their annual leave entitlement what they would have been paid had they taken the leave, which would include leave loading.

47. If section 90(2) of the *Fair Work Act* 2009 is amended by the *Fair Work Amendment Bill* 2014, then the requirement that employees must be paid their annual leave entitlement what they would have been paid had they taken their leave would be removed. The strict interpretation of the Modern Manufacturing Award will revert to a position which did not include annual leave loading on termination. The clear effect of the amendment is to remove the entitlement which is paid to employees who are either changing jobs or in the worst case, being made redundant in a transitioning economy.

48. In the Annual Leave Common Issues Proceedings, as part of the 2014, 4 yearly review of Modern Award, the ACTU has commenced outlining submissions to ensure that any ambiguity is removed with respect to annual leave loading. The ACTU has made submissions supported by the AMWU which seek to ensure that annual leave loading is paid on termination as per the National Employment Standard. In addition, the Fair Work Ombudsman has made general submissions noting the inconsistency of some awards in not providing annual leave loading to be payable on termination.[20]

49. The proceedings currently before the Fair Work Commission should be allowed to run their course under the current legislation. Parties, including the Fair Work Ombudsman, have made submissions to ensure an existing entitlement in awards where there is ambiguity. The passage of the legislation would be to dictate an outcome in those proceedings against employees who are award reliant.

---

[17] *Modern Awards Review 2012 - Annual Leave* [2013]FWCFB 6266 per SDP Acton, DP Gooley (majority)at paragraphs [129] to [140] with variations supported by VP Watson.
[18] *Modern Awards Review 2012 - Annual Leave* [2013]FWCFB 6266 per SDP Acton, DP Gooley (majority) at paragraph [140]
[19] Clause 41.5 of the Manufacturing and Associated Industries and Occupations Award 2010.
[20] Fair Work Ombudsman Submission to the 4 Yearly Review Initial Stage Proceedings AM2014/1 dated 3 February 2014 accessible here:
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141_sub_FWO_030214.pdf

50. Against this backdrop, the Government's Bill cannot implement Recommendation 6 without breaking the Prime Minister's headlining commitment that employee entitlements would be protected. The Government's legislation is not only taking away an entitlement that currently exists, but is also undermining both the Fair Work Ombudsman and the Fair Work Commission.

51. The Senate must protect employee entitlements by holding the Government to its pre-election commitments and support the existence of an independent industrial umpire by rejecting the bill.

Right of Entry

52. Right of entry to workplaces is important to ensure that employees have free and easy access to their representatives, to raise any issue, whether minor or significant at convenient times during breaks and at convenient locations at their workplace. Union right of entry helps to ensure that employers do not engage in inappropriate conduct in response to employees exercising their right and ensures employees maximise their ability to bargain for their fair share of the value of their work.

53. Employees need to be able to speak to their union officials and representatives without fear of retribution or persecution by employers. Employer intimidation of employees exercising their workplace rights is unfortunately becoming a regular occurrence and the existence of union officials exercising their right of entry assists in shielding such employees from injury to their position. Employers can injure employees in their position in a number of ways, which can range from unfair disciplinary procedures (including dismissal) through to loss of overtime, shifts, and allowances which amount to monetary penalties.

54. Even where an employee has an official role as a work, health and safety representative and has access to a union, this may not necessary prevent employers from seeking to treat employees unfavourably or in a manner detrimental to their position. The AMWU was involved in successfully bringing an action against an employer, Visy Packaging, for launching an investigation against and then suspending a Health and Safety Representative (HSR).[21] The HSR had "tagged" two forklifts which had reverse beepers which were inaudible above the factory noise. The beepers were subsequently fixed on the same day.

55. In this case, the involvement of the public regulator Victorian Worksafe did not assist the employee in asserting their workplace right to raise a safety issue, even as a formally elected Health and Safety Representative. It took the involvement of the union to ensure that the employee was not treated adversely by the employer unjustly. As a result of the Union's involvement, the employer was subsequently fined by the Court for taking adverse action against the employee.

56. The successful prosecution of Patrick Stevedoring for discriminating against an employee for raising a work, health and safety concern is another clear example of a well resourced employer using its power to stand down and injure an employee in their position to pursue its objectives.

57. The unions involvement in this instance resulted in the employee not losing pay for being stood down. If there were no union involvement, it is clear that the employer would have been even further emboldened to contest the employee's exercise of their rights by exerting pressure on the employee by withholding pay for the period the employee was stood down.

[21] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3*) [2013] FCA 525 (29 May 2013)

These examples demonstrate that there must be access to unions to ensure that where inappropriate employer conduct occurs, it is dealt with and referred to the appropriate authorities, or prosecuted by the union.

58. Having strong involvement from unions in workplaces ensures that employees can refer industrial matters whether they relate to work, health and safety or otherwise to their union representatives, who in turn can raise them with the employer in an environment that is free from the spectre of the employer's arbitrary exercise of power.

59. Union officials can raise issues with employers without fear of any potential repercussions or placing their future promotion or treatment in jeopardy. This involvement of union officials then supports the development of workplace cultures that allow for workplace representatives to be respected in their roles.

60. Workplaces with access to union representatives also enjoy on average better wages, conditions and entitlements than workplaces which do not. Trade union members earned on average $123 more a week than non-union members.[22] Right of Entry for unions directly assists employees access their fair share of the value generated by their work in the economy, although it is noteworthy that in the recent matters of the closure of GMH and the near-closure of SPC Ardmona, both matters in which the jobs of many AMWU members were at stake, the Prime Minister saw fit to castigate workers, unions and the relevant employers for having rates of pay over and above the award

61. The Bill's proposed process for applying for Invitation Certificates[23] is an additional process that is cumbersome and is intimidatory in its formality. An employee seeking to raise potential issues at a workplace with a union should not be required to engage in such a formal process with the Fair Work Commission in order to access their representative. The process of raising an "Invitation Certificate" is novel and bizarre and reverses over 100 years of the legal entry of union representatives in to the workplace when on legitimate union business. It makes the matter of Right of Entry a "right to invite", which is a different thing altogether.

62. The Bill's referral to the Executive Government to set regulations that might outline limitations, requirements or restrictions on the expiry date of the Invitation Certificates is an inappropriate delegation and another reason why the changes should not be supported. Any restrictions on the Fair Work Commission's exercise of its power to issue the Invitation Certificates, if any, should be determined by the Parliament.

63. The current requirements placed on Right of Entry Permit Holders are sufficient to ensure that Permit Holders exercise their Right of Entry in an appropriate manner. It is an unnecessary additional hurdle to make employees and their representatives make application to a quasi-judicial body in order to have discussions during work breaks at the place of employment.

64. The most recent changes which have supported union right of entry into workplaces have only commenced operation as of 1 January 2014[24] and have not been operative for a sufficient period of time to allow the parliament to assess its impact.

[22] 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2012, mean weekly earnings of trade union members $1215 per week compared with the mean weekly earning for persons in all industries $1092 per week.
[23] Schedule 1, Part 8, item 67, *Fair Work Amendment Bill* 2014.
[24] Most recent amendments to the Right of Entry provisions made by the *Fair Work Amendment* Bill 2013 commenced operation 1 Janurary 2014.

Greenfields

65. The Coalition's policy although highlighting that it wanted to address lengthy bargaining periods for Greenfield Agreements, also highlighted that it wished to introduce good faith bargaining for bargaining representatives for a Greenfield Agreement.[25]

66. To give effect to the Coalition's own policy, it must ensure that good faith bargaining orders have time to be given effect to and for good faith bargaining to actually occur. The *FWA Bill* 2014, in fact proposed to render the good faith bargaining requirements, all good faith bargaining orders, and serious breach declarations inoperable, void in effect once the three month period for bargaining has expired.[26]

67. The FWA Bill 2014 allows employers to unilaterally seek to have their Greenfield Agreement approved by the Commission once the three month negotiation period has ended.[27] This ability to unilaterally apply to the Fair Work Commission for a Greenfield Agreement approval provides an incentive for the employer to hold out on agreement until the three month period has ended. There is no incentive for the employer to reach agreement with the employee bargaining representatives.

68. The proposed scheme for approving Greenfield Agreements places near complete control over the work wages and conditions of employment in the hands of an employer who is prepared to withhold agreement for three months.

Conclusion

69. For the reasons outlined above, the AMWU submits that the Senate should reject the *Fair Work Amendment Bill* 2014.

End

[25] "The Coalition's Policy to Improve the Fair Work Laws," May 2013 at p29
[26] Schedule 1, Part 5, item 50 *Fair Work Amendment Bill* 2014.
[27] Schedule 1, Part 5, item 28, *Fair Work Amendment Bill* 2014