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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAIR WORK AMENDMENT BILL 2014**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Senator the Honourable Eric Abetz)



## FAIR WORK AMENDMENT BILL 2014

### **OUTLINE**

The Fair Work Amendment Bill 2014 (the Bill) makes amendments to the *Fair Work Act 2009* (Fair Work Act) to implement elements of *The Coalition's Policy to Improve the Fair Work Laws*. Specifically, the Bill responds to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2012) review into the operation of the Fair Work Act by the Fair Work Review Panel. The Bill will amend the Fair Work Act to:

- respond to Fair Work Review Panel recommendation 3 by providing that an employer must not refuse a request for extended unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request;
- respond to Fair Work Review Panel recommendation 6 by providing that, on termination of employment, untaken annual leave is paid out as provided by the applicable industrial instrument;
- respond to Fair Work Review Panel recommendation 2 by providing that an employee cannot take or accrue leave under the Fair Work Act during a period in which the employee is absent from work and in receipt of workers' compensation;
- respond to Fair Work Review Panel recommendations 9, 11, 12 and 24 by:
  - requiring flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of individual flexibility arrangements with 13 weeks' notice;
  - requiring flexibility terms in enterprise agreements to provide, as a minimum, that individual flexibility arrangements may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading;
  - confirming that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employee is better off overall under an individual flexibility arrangement and require individual flexibility arrangements to include a statement by the employee setting out why he or she believes that the arrangement meets his or her genuine needs and leaves him or her better off overall at the time of agreeing to the arrangement; and
  - providing a defence to an alleged contravention of a flexibility term where the employer reasonably believed that the requirements of the term were complied with at the time of agreeing to a particular individual flexibility arrangement.
- establish a new process for the efficient negotiation of single-enterprise greenfields agreements by:
  - extending good faith bargaining to the negotiation of these agreements; and
  - providing an optional three month negotiation timeframe for the parties to reach agreement. An employer will be able to apply to the Fair Work Commission (FWC) for approval of its agreement where agreement cannot be reached with the relevant employee organisation(s) in that period. The existing approval tests under the

Fair Work Act will be retained with a new requirement to ensure that the agreement is consistent with prevailing industry standards.

- respond to Fair Work Review Panel recommendation 38 by providing that there will not be a transfer of business under Part 2-8 of the Fair Work Act when an employee becomes employed with an associated entity of his or her former employer after seeking that employment on his or her own initiative before the termination of the employee's employment with the old employer. Similar amendments are also made in relation to Part 6-3A of the Fair Work Act.
- amend the right of entry framework of the Fair Work Act by:
  - repealing amendments made by the *Fair Work Amendment Act 2013* that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;
  - providing 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;
  - repealing amendments made by the *Fair Work Amendment Act 2013* relating to the default location of interviews and discussions and reinstating pre-existing rules; and
  - expanding the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.
- respond to Fair Work Review Panel recommendation 31 by providing that an application for a protected action ballot order cannot be made unless bargaining has commenced;
- respond to Fair Work Review Panel recommendation 43 by providing 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; and
- provide for the Fair Work Ombudsman to pay interest on unclaimed monies.

**FINANCIAL IMPACT STATEMENT**

Nil

# Details-stage Regulation Impact Statement

## Fair Work Act Amendments

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## 1. Context

The *Fair Work Act 2009* (Fair Work Act) and the *Fair Work Regulations 2009* (Fair Work Regulations) provide the legislative framework underpinning the national workplace relations system, which covers the majority of Australian workplaces.

In May 2013 the Government released *The Coalition's Policy to Improve the Fair Work Laws* (the Policy) to build on and improve the operation of the Fair Work laws. The key measures and objectives addressed in the Policy are intended to restore certainty to the workplace relations system while balancing the needs of employers and employees. These measures include:

- introducing good faith bargaining and setting realistic timeframes for the negotiation of greenfields agreements
- reinstating the right of entry provisions which existed prior to the Fair Work Act and repealing further recent amendments made by the previous government
- adopting a number of outstanding recommendations of the 2012 post-implementation review of the Fair Work legislation (Fair Work Act Review)
- promoting harmonious, sensible and productive enterprise bargaining.

This Details-stage Regulation Impact Statement examines the amendments that will be included in the first round of measures to implement the Policy deemed to have a regulatory impact. The Department of Employment's (the Department) assessment of the impact of the changes in the Options-stage Regulation Impact Statement was tested with stakeholders and refined accordingly.

## 2. Greenfields Agreements

### 2.1 Problem

Greenfields agreements are a form of enterprise agreement that can be made under the Fair Work Act before any employees have been engaged at a new enterprise. They are extensively used in large scale construction and resources projects. They must be made between the prospective employer and a union or unions that are able to represent a majority of employees who will be covered by the agreement.

On large projects, having a greenfields agreement in place is often an essential step in securing finance and other approvals for the project as it provides greater certainty about labour costs and limits exposure to industrial action. The panel conducting the Fair Work Act Review (Review Panel) highlighted the critical importance of major projects to the Australian economy. In its report, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (Review Report), the Review Panel noted evidence provided by the Business Council of Australia (BCA) indicating that the pipeline of capital projects either underway, under consideration or in planning was worth \$912.8 billion at that time (page 171). The Review Panel further noted the BCA's view that these projects are not assured, and potential investors continually review risks associated with them (page 171).

Submissions made to the Fair Work Act Review by a number of employer associations representing employers in the construction and mining industries showed that some unions have exploited their legislated role in making greenfields agreements to seek excessive wage claims and delay the commencement of projects, creating significant doubt over whether a project will proceed. Extended negotiation timeframes have immediate cost implications for employers while staff are tied up in bargaining rather than being usefully engaged elsewhere in the organisation. There may also be ancillary costs such as travel and accommodation for the employer's staff members, as well as costs for meeting rooms.

Greenfields bargaining practices mean that the commencement of projects can be delayed or possibly abandoned. Alternatively, employers may be forced to agree to claims that are economically unsustainable. The Review Panel found that 'some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia' (page 171). The Review Panel found that:

*'the existing provisions effectively confer on a union (or unions) with coverage of a majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way. Unions in this position are able to withhold agreement and effectively prevent the determination of terms and conditions in advance of a project commencing. In light of the evidence we were presented about the need for certainty over the labour costs associated with major projects, we are concerned at the risk of delays in greenfields agreement making that this entails' (page 171-172).*

An employer may proceed with a new project without a greenfields agreement in place and negotiate an enterprise agreement when employees commence working on the project. This alternative, while not available for projects where certainty of wages costs is required in order to achieve investment funding, may result in protected industrial action early in the life of the enterprise, leading to scheduling and cost blowouts. Such projects would rely on the relevant modern award to determine wages and conditions of employment, a sub-optimal outcome for

projects that require site specific working arrangements not catered for under modern awards. For example, these projects often have employees working on ‘week on week off’ working hours, while modern awards generally provide for a 38 hour working week.

## **2.2 Objective**

The Government’s overarching policy objectives in this area are threefold: to ensure that there are realistic timeframes for the negotiation of greenfields agreements; to ensure that negotiations do not delay or jeopardise investment in major projects; and to provide that the interests of employees to be covered by such agreements are protected.

## **2.3 Options**

### *2.3.1 Option One – Maintain the status quo*

Retaining the status quo will mean that greenfields bargaining is not subject to good faith bargaining rules and that employers will continue to need the agreement of the union or unions able to represent a majority of employees who will be covered by the agreement to make a greenfields agreement. This option will not address issues identified with greenfields bargaining that have resulted in major projects being jeopardised and/or subject to undue delays, and economically unsustainable wages and conditions applying to such projects.

### *2.3.2 Option Two – Introduce greenfields agreements bargaining reforms*

Option two is to implement the proposed reforms to greenfields agreement negotiations identified by the Government in the Policy.

This requires application of good faith bargaining rules to greenfields agreement negotiations to address inappropriate bargaining conduct and to encourage unions and employers to reach agreement. The good faith bargaining rules will be modelled on the provisions set out in section 228 of the Fair Work Act, with appropriate differences to account for the particular circumstances in relation to greenfields bargaining. The existing good faith bargaining requirements outline minimum standards of bargaining conduct that must be met, including for example that bargaining representatives must attend and participate in meetings and recognise and bargain with other bargaining representatives.

This option will require the Fair Work Act to be amended to enable an employer to take a proposed greenfields agreement to the Fair Work Commission for approval where agreement has not been reached with the relevant union/s within three months of the commencement of negotiations. Like all other types of enterprise agreements, greenfields agreements will still have to satisfy existing agreement approval tests under the Fair Work Act, including the ‘better off overall test’. Additionally, as a new requirement, the Fair Work Commission will also have to be satisfied that the agreement provides for pay and conditions that are consistent with the prevailing standards and conditions within that industry.

Together these measures will work to improve the conduct of bargaining and provide a circuit breaker to ensure that the bargaining parties pursue arrangements that are reasonable, timely and reflect industry standards.

## **2.4 Impact Analysis**

### *2.4.1 Option One – Maintain the status quo*

Option one maintains the status quo. It has been used as the benchmark for considering the costs and benefits of the two options.

#### Prevalence of the problem

A large number of employer representatives raised concerns about the operation of the greenfields agreement provisions in the conduct of the Fair Work Act Review. They made a range of recommendations in relation to greenfields agreements to address the issues raised by stakeholders.

The Review Panel noted that in the first two years of the Fair Work Act, greenfields agreements comprised 6.4 per cent of all agreements and provided an average annual wage increase of 4.7 per cent, compared to 3.9 per cent for all agreements and 4.0 per cent for union agreements (page 170). The Review Panel further noted that over two-thirds of greenfields agreements occur in construction, with a further 5.2 per cent in the mining industry (page 170). Evidence presented to the Review Panel indicated that concerns with the operation of the greenfields provisions largely centred on these industries.

#### Benefits

The benefit of retaining option one is that the system is understood by employers and unions and so there would not be any transition costs in developing an understanding of a new greenfields bargaining framework.

#### Costs

The Review Panel documented a range of costs associated with the negotiation of greenfields agreements under the existing framework. The Review Panel recommended some major changes to the greenfields bargaining framework having found that existing bargaining practices had the potential to threaten investment in major projects in Australia. The Review Panel found that the current system enabled unions ‘to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way’ (pages 171-172). The Review Panel further found that wages outcomes under Fair Work Act greenfields agreements and enterprise agreements had widened, that greenfields agreements were less likely to contain flexible agreement clauses and that greenfields agreements were more likely to contain clauses that resulted in increased costs for employers (pages 170-171).

### *2.4.2 Option Two – Introduce greenfields agreements bargaining reforms*

#### Benefits

Option two will ensure that greenfields agreements are negotiated in an appropriate and expeditious manner and that the outcomes of greenfields bargaining are economically sustainable, reflecting terms and conditions of employment of the relevant industry. The changes will ensure that greenfields agreement negotiations do not unduly delay or jeopardise investment in major projects, while at the same time protecting the interests of the employees to be covered by such agreements.

This approach will significantly reduce the burden on parties engaged in ongoing negotiations for many months. Under current arrangements, an employer may need to allocate dedicated resources for an undetermined period of time to the negotiation of a greenfields agreement. The amendments will provide far greater certainty as to how long negotiation resourcing will be required. This will ensure that staff otherwise involved in protracted bargaining can be productively engaged elsewhere in the organisation.

The amendments will also provide employers with more certainty on project start dates and therefore reduce costs caused by lengthy delays due to prolonged negotiations with the relevant union/s. Expeditious negotiations will allow business to generate income and employment at the earliest opportunity.

Improving the conduct of greenfields bargaining will also have significant nation-wide impacts given the importance of major projects to the Australian economy. Ensuring that greenfields agreements are negotiated in a timely manner and reflect prevailing industry standards will help to maximise the viability of major projects.

### Costs

There may be some compliance costs to both employers and unions, particularly where parties have previously not been bargaining in good faith. This will involve, for example, having to attend meetings and respond to proposals of the other party within a reasonable timeframe. This will be offset by expedited start-up of projects and reasonable wage rates in greenfields agreements. The approval process for greenfields agreements associated with the new shorter bargaining period will have some differences from the current process but is not intended to take longer than the current FWC agreement approval process.

## **2.5 Regulatory cost calculations**

### *2.5.1 Overview*

The Department has identified regulatory reductions associated with legislative changes to reduce the length of greenfields agreement negotiations. These changes will reduce administrative costs associated with negotiating a greenfields agreement and delay costs in the form of deferred profits. The Review Panel accepted that unions were in a position to “frustrate” bargaining and withhold making an agreement, creating uncertainty around labour costs and risking project delays.

Based on significant anecdotal evidence and qualitative statements provided to the Review Panel, as a rough estimate, five months is used as a hypothetical time period for protracted greenfields agreement negotiations for major resource and energy projects. The Department considers that the legislative changes to greenfields agreement negotiations would reduce negotiations by two months, via two means. Firstly, the policy encourages employers and unions to negotiate a greenfields agreement within three months, and secondly, where agreement cannot be reached, provides a circuit breaker to have a greenfields agreement approved by the FWC.

The Department has assumed that while the majority of employers negotiating greenfields agreements under the new arrangements will experience an administrative cost saving due to reduced bargaining times, this may not affect the commencement date of the project. The Department acknowledges that unreasonably protracted greenfields agreement negotiations will

not always result in project delays because other factors can also delay commencement, such as environmental approvals, capital requirements and so on.

In the analysis below, delay costs have been calculated on a per project basis, while administrative costs have been calculated with reference to the number of greenfields agreement negotiations. These have been treated separately in the analysis below.

### *2.5.2 Delay costs*

The delay cost offset has been calculated for major resource and energy projects and other capital intensive construction projects. The Department considers that regulation change will have the most significant effect on major resource and energy projects and other capital intensive construction projects, based on evidence provided to the Review Panel (page 171).

The Bureau of Resources and Energy Economics (BREE) produces data on the size and stage of completion of major resource and energy projects which is readily available allowing for better informed assumptions. Furthermore, a review of current greenfields agreements shows that the majority cover construction and mining related to major projects. The early stages of resource and energy projects include significant construction work. This is discussed in more detail in the section below.

The Department recognises that regulation change would also lead to a reduction in delay costs for other capital intensive construction projects such as large building construction and road and transport construction sites. The National Infrastructure Construction Schedule (NICS) provides information on major infrastructure projects, including their cost estimates and expected lengths of construction. This is discussed in more detail below.

### Resource and energy projects

The Department has used BREE data on major resource and energy projects involving investments greater than \$50 million to create a picture of the number of major projects that may be affected by the regulation change. The “Resources and Energy Major Projects Report” (<http://www.bree.gov.au/publications/resources-and-energy-major-projects>) collates data based on a model of the mining investment pipeline and categorises projects into four stages.

Of these four stages, the “Feasibility Stage” is when greenfields agreement negotiations are most likely to occur. At the Feasibility Stage, projects have undertaken project definition and design studies, commenced detailed planning and conducted environmental surveys.

At October 2013, there were 125 new resource and energy major projects at the feasibility stage. These do not include projects for mine expansion. The average indicative cost of these new projects at the feasibility stage is approximately \$1.8 billion. This represents a significant pipeline of investment.

The BREE data indicates that over the 18 months to October 2013, on average, 16 major projects worth around \$700 million each moved into the “Committed Stage” each year from the Feasibility Stage. At the Committed Stage, projects have received all required regulatory approvals, finalised the financing for the project and construction may have already started. This would generally occur after greenfields agreements are in place.

Overall, new projects make up almost seven major projects out of every ten. On this basis, the Department assumes that every year out of 16 projects that reach the Committed Stage 10 are new major projects and require greenfields agreements.

Therefore, over a ten year period, 100 new major projects would move from the Feasibility Stage to the Committed Stage. These projects could be delayed by problems with prolonged negotiations identified by stakeholders and the Review Panel.

There is no available data on the frequency of delays on which to cost the regulatory reduction. The Department considers that while greenfields agreement negotiations are one factor out of several that could delay or make projects economically unviable (such as environmental approvals and commodity prices), they occur in the critical path toward project completion and have the capacity to affect project commencement dates.

The cost offset has been based on delays for 50 of the 100 projects over ten years, or five projects per year. This is based on an assumption that around half of all projects moving from the Feasibility Stage to the Committed Stage over the ten year period would be delayed by a greenfields agreement negotiation. The Department considers this may be a conservative estimate.

The delay costs identified by the Department are based on the methodology used in a Regulation Impact Statement produced by Deloitte Access Economics for the former Department of Sustainability, Environment, Water, Population and Communities, entitled “Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the Environment Protection and Biodiversity Conservation Act 1999” (the EPBC Report), published in April 2011.

This methodology draws on established principles outlined in the Productivity Commission’s 2009 report on the “Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector” and estimates made by the Australian Petroleum Production and Exploration Association in “Upstream Oil & Gas Industry Strategy – Platform for Prosperity”. The methodology models the impact of delays on project cash flows measured by net present value.

The Department has assumed an annual return on investment for large resource and energy projects of 25 per cent. While there is no definitive data available on the rate of return for mining projects, analysis of several data sources indicate that this is a reasonable estimate. This includes:

- ABS Annual System of National Accounts data for 2012-2013 (Cat. No. 5204.0) showing an industry wide return on projects across all sectors, all project sizes and both new and existing projects,
- CommSec stock market data (February 2014) showing the ten year average rate of return on capital for major mining companies, such as BHP Billiton, and
- the Productivity Commission’s report *Major Project Assessment Processes* (December 2013).

The Department has assumed that for a project involving \$700 million in total investment:

- \$50 million is invested at the Feasibility Stage,
- \$650 million is invested over three years at the Commitment Stage,



- The completed project is productive for 20 years,
- The annual return on investment is 25 per cent, and
- The delay is two months.

Based on this, the Department estimates that reversing the delay of two months on a major project would save \$4.6 million in net present value per project. This would result in a total delay cost reduction of \$23 million dollars per year across five projects.

#### Other capital intensive construction projects

The Department has drawn on data from the National Infrastructure Construction Schedule (NICS) to estimate the number of other capital intensive construction projects, such as roads and transport infrastructure, likely to be affected by the regulatory changes. The schedule of construction projects is a list of all government work worth over \$50 million and at the stages of development from feasibility and government commitment through to final approvals. This is the period when greenfields agreements are likely to be negotiated. Work currently under construction is not included in the schedule.

At June 2013, there were 74 infrastructure construction projects identified on the schedule. The majority of these projects, 64 in total, are scheduled to begin between 2011 and 2014.

The Department considers that the average number of projects scheduled per year between 2011 and 2014, 16 per year, is a reasonable estimate of the number of projects that are likely to be scheduled over future years as governments continue to commit to new infrastructure construction projects past 2014.

As with resource and energy projects, there is no available data on the frequency of delays on which to cost the regulatory reduction. Consistent with our estimate for large resource and energy projects, the Department considers that the commencement of around half of these infrastructure projects may be delayed due to the current greenfields agreement making system. That is, approximately eight major infrastructure projects per year could experience a cost savings from reduced delays in the commencement of construction.

Large infrastructure construction projects funded by governments are generally contracted out to a private sector organisation or 'head contractor'. Data from the NICS show that on average each project has a cost of \$500 million dollars and are scheduled to takes three years of construction to complete. To model the delay cost saving to business, the Department has assumed that the \$500 million cost to government includes capital expenditure and profits charged by a head contractor.

The Department has estimated an annual return on investment of 15 per cent for the head contractor. This has been estimated by calculating the *risk adjusted discount rate* for construction projects using stock market data on construction and engineering. This is a standard calculation, yielding a *risk-adjusted discount rate* for construction projects of 15 per cent. The Department considers that this is a conservative estimate on the basis that the rate is a reflection of the construction sector's risk as a whole, rather than for individual projects, which is expected to be higher.

Therefore, it is expected that for a three year project costing the government \$500 million:

- capital expenditure is \$435 million,
- a head contractor will expect to make profits of around \$66 million, based on a 15 per cent rate of return on the capital expenditure of \$435 million, and
- the capital expenditure and head contractor's profits are distributed evenly over the three years.

Using the methodology for calculating differences in net present value described above, the Department estimates that a delay of two months results in a delay cost reduction of around \$1.25 million per project.

It is also likely that private sector construction would experience delay cost reductions as a result of the policy. The value of private sector construction, for instance construction of large residential or commercial buildings, makes up around three quarters of all engineering construction commenced (ABS Cat no. 8762.0). In the absence of data on the size and number of private projects, it is assumed that private sector construction would have a similar profile to public works commissioned by government.

On this basis, the Department has assumed that the number of other capital intensive construction projects in the private sector each year is equal to the number of government infrastructure projects (16 projects).

The Department considers that, similar to government infrastructure construction projects, around half of all private sector construction projects each year would experience a delay in commencement as a result of greenfields agreement negotiations. Therefore, eight private sector construction projects would also benefit from the changes to greenfields agreement negotiations.

A delay cost reduction of \$1.25 million per project for eight public and eight private sector construction projects per year would result in a total delay cost reduction of \$20 million each year over 10 years.

### *2.5.3 Administrative costs*

The administrative costs identified by the Department are based on the assumption that bargaining for a greenfields agreement currently extends for a period of around five months. The proposed amendments would enable an employer to take a greenfields agreement to the Fair Work Commission for approval after a period of three months from the commencement of bargaining. It is expected therefore that the proposal would reduce the length of negotiations by around two months, saving considerable costs in resources, particularly labour, devoted to bargaining for each agreement.

It should be noted that this is distinct from delays to the commencement of a major project, detailed above. The Department considers that many greenfields agreement negotiations would not significantly delay the commencement of a major project. Even where a project is not delayed, negotiations can be unreasonably protracted. The Department expects that the proposed changes would likely reduce this cost burden for the vast majority of businesses that are negotiating greenfields agreements.

A review of data published by the Fair Work Commission shows that on average there are around 650 greenfields agreements approved each year (the data can be accessed via the Fair Work Commission website). The Review Panel quoted evidence that around 70 per cent of greenfields agreements are in the construction and mining industries. Assuming that construction and mining agreements continue to make up a similar proportion of the total number of agreements in the future, it is estimated that around 450 construction and mining agreements could be affected by the proposed changes (page 170).

The Department has assessed a sample of mining and mine construction greenfields agreements covering major projects. The sample showed that there are, on average, around 40 greenfields agreements in operation at each major project that apply to different contractors. As noted above, an average of 10 new major projects progressed to the committed stage over the past 18 months. Assuming this trend continues and each of the 10 new major projects require 40 greenfields agreements, it is estimated that an average of around 400 greenfields agreements will be negotiated each year for new major resource and energy projects.

The high number of greenfields agreements that are negotiated for major projects supports the assumption that the majority of construction and mining greenfields agreements approved by the Fair Work Commission relate to major resource and energy projects. It is expected that each year around 50 greenfields agreements would be negotiated for other capital intensive infrastructure projects.

The Department estimates that of these, around 90 per cent from each industry (that is 360 in mining and mining construction and 45 in other construction) would remain in bargaining for around five months and would therefore experience cost savings arising from the proposed changes.

In summary, based on data for previous years, the Department projects that 360 mining and mining construction greenfields agreements and 45 greenfields agreements covering other construction works will experience administrative cost savings as a result of changes to greenfields agreement negotiations.

There is no available data on the exact length of greenfields agreement negotiations or enterprise agreement bargaining more generally. However the Department has made a reasonable estimate regarding the time and resources required to negotiate a greenfields agreement based on evidence provided by several stakeholders during the Fair Work Act Review that such negotiations with unions are 'lengthy and onerous' (page 169). The figure also accounts for the fact that negotiations generally involve several unions, increasing the resources and time required to liaise with, meet, and secure the agreement of, all relevant parties.

While authoritative data on the time dedicated to bargaining for a greenfields agreement is not available, the Department has estimated that each staff member on a bargaining team would spend approximately 23 hours per week on the negotiations. This figure takes into account not just the direct negotiations, but also the planning, preparation and costing required to negotiate and conclude a greenfields agreement. Furthermore, organisations making greenfields agreements tend to be large, often multinational or joint venture corporations. While this has not been specifically costed, it is likely that considerable time and resources would be devoted to additional tasks such as meeting with senior executives, liaising with representatives of parent companies and seeking finance and approval from board members.

The Department accepts that staff members, and therefore labour costs, dedicated to bargaining for greenfields agreements would vary, including based on the profile of the agreement, approach taken to bargaining by the union and the industry in which negotiations occur. These costs are treated separately below.

Table 1 below sets out the average weekly earnings before tax for a number of roles expected to be involved in negotiations. In response to stakeholder feedback on the Options stage RIS, the Department has updated the average weekly earnings. The Department has used job titles and average yearly salaries before tax drawn from the MyCareer Salary Centre for the December 2013 quarter. These roles have been identified for their expertise in labour relations and the specific work and organisation to be conducted at greenfields sites. Weekly earnings have been calculated by dividing the annual salary by 52 weeks and hourly rates of pay have been calculated by dividing the weekly amount by 38 hours.

**Table 1 - Employee earnings**

<b>Classification</b>	<b>Weekly earnings</b>	<b>Hourly rate</b>
Human Resources and Recruitment - Management	\$3285	\$86.45
Human Resources and Recruitment - Industrial Relations	\$2140	\$56.32
Mining - Engineering	\$3084	\$81.16
Construction, Building and Architecture – Project Management	\$2862	\$75.32

#### Negotiations for agreements at major projects

##### *One headline greenfields agreement per major project*

Major projects in the mining and mine construction industry tend to have one ‘headline’ or high profile greenfields agreement, for which the negotiations are resource intensive. The Department considers that a bargaining team for these agreements would comprise five relatively senior staff at the classifications in Table 1 as follows; two Mining - Engineering, two Human Resources and Recruitment - Management and one Human Resources and Recruitment – Industrial Relations.

On the assumption that each member of the bargaining team would spend approximately 23 hours per week on the negotiations and that the length of negotiations is reduced by two months, a business is likely to save 184 hours of wages for each staff member. Applying this to 10 greenfields agreements each year (one per major project), the proposed changes would result in a compliance cost saving of \$835,709. This has been calculated in the business cost calculator, and includes the automatic on-cost to labour rates.

##### *Several greenfields agreements at each major project*

The remaining greenfields agreements associated with major mining and mining construction sites tend to adopt fairly similar provisions to those enshrined in the headline agreement, with modification to suit the specific needs of the employees or employers to be covered by the agreement. For this reason, negotiations are likely to be less resource intensive. The Department considers that a bargaining team for these agreements would comprise three staff members at the

classifications in Table 1 as follows: one Mining - Engineering and two Human Resources and Recruitment - Management.

On the assumption that each member of the bargaining team would spend approximately 23 hours per week on the negotiations and that the length of negotiations is reduced by two months, a business is likely to save 184 hours of wages for each staff member. Applying this to about 350 greenfields agreements each year, across the ten major projects, the proposed changes would result in a compliance cost saving of \$ 18,979,324. This has been calculated in the business cost calculator, and includes the automatic on-cost to labour rates.

#### Negotiations for agreements at other capital intensive infrastructure/construction sites

The resources dedicated to greenfields agreement negotiations associated with other capital intensive infrastructure projects would likely vary depending on a range of factors, including the size of the project, number of employees to be employed at the site and the organisations involved. The Department estimates that on average a bargaining team for these agreements would comprise two staff members at the classifications in Table 1 as follows: one Human Resources and Recruitment – Management and one Construction, Building and Architecture – Project Management.

On the assumption that each member of the bargaining team would spend approximately 23 hours per week on the negotiations and that the length of negotiations is reduced by two months, a business is likely to save 184 hours of wages for each staff member. Applying this to the approximately 45 greenfields agreements associated with construction sites each year, the proposed changes would result in a compliance cost saving of \$1,553,742. This has been calculated in the business cost calculator, and includes the automatic on-cost to labour rates. Based on the cost of all negotiations, calculated in the business cost calculator, the proposed changes would result in a total compliance cost saving of \$21,368,775 each year.

The cost offset in table 2 below is based on a total saving per year over ten years.

**Table 2 - Annual cost offset**

	<b>Agency</b>	<b>Within portfolio</b>	<b>Outside portfolio</b>	<b>Total</b>
Business	\$0	\$64,368,775	\$0	\$64,368,775
Not-for-profit	\$0	\$0	\$0	\$0
Individuals	\$0	\$0	\$0	\$0
Total	\$0	\$64,368,775	\$0	\$64,368,775

### 3. Right of entry

#### 3.1 Problem

Under the Fair Work Act union officials with an entry permit have a right to access workplaces to hold discussions with employees. Entry rights in the Fair Work Act are broader than under previous workplace relations legislation and have led to excessive workplace visits and unnecessary disruptions at some workplaces.

To be entitled to enter a workplace to hold discussions under the *Workplace Relations Act 1996*, a union had to be bound by an award or agreement that covered a workplace where there were union members or employees eligible to be union members. The Fair Work Act amended the right of entry provisions so that a union official's right to enter a workplace to hold discussions is tied to whether the relevant union is entitled to represent the industrial interests of relevant employees at the workplace. This has increased the number of unions that can visit a particular workplace and has resulted in increased costs to some employers and adversely affected their productivity, due to excessive visits by some unions and disputes between unions over eligibility to represent employees.

Each time a union official visits a workplace to hold discussions with employees, an employer must allocate resources to facilitate their entry, taking resources away from other tasks. This would typically involve allocating employee/s to ensure that a union official complies with all work health and safety requirements at the workplace, including taking them through a safety induction if necessary, and escorting the union official around the workplace.

The significance of the problem of excessive workplace visits by union officials was recognised by the Review Panel. For example, it was noted in the Fair Work Act Review Report that during the construction phase of BHP Billiton's Worsley Alumina plant, visits by union officials increased from zero in 2007 to 676 visits in 2010 alone (page 193). The Review Panel also noted that Ai Group submitted that in a survey of 245 employers in August 2011 across many industries, 37 per cent of employers reported that union officials had visited their workplace more often since the commencement of the Fair Work Act (page 193).

Evidence provided by the Chamber of Commerce and Industry Western Australia to the Review Panel was also outlined in the Fair Work Act Review Report. An affidavit attached to the submission described one workplace being visited up to 17 times a day and nearly 700 times in a year on onshore resource construction projects in Western Australia (page 193). In the 2010 Fair Work Australia case of *CFMEU v Foster Wheeler Worley Parsons (Pluto) Junior Venture* [2010] FWA 2341 the employer gave evidence that there had been 217 right of entry requests made in a four month period in 2009 at workplace where approximately 3300 employees were engaged (page 193).

The Review Panel noted that evidence submitted to them suggested that frequent right of entry visits is a more significant issue for large worksites where several unions have a right of entry, such as those in the mining or construction sector (page 193). Furthermore, the Review Panel was concerned that in some instances the motivation for excessive right of entry visits may not be consistent with those authorised by the Fair Work Act (page 194).

New provisions which commenced on 1 January 2014 may directly lead to disruption of employees during their meal breaks. Prior to 1 January, an employer was required to provide a reasonable room for a union official to conduct interviews or hold discussions. A union official

now has access to the meal or break room if agreement on another room cannot be reached between the union and employer. In submissions to the Parliamentary inquiries into the Fair Work Amendment Bill 2013 (which introduced this new provision) many stakeholders raised concerns that this will prevent employees from enjoying their breaks without disruption, noting that the majority of Australia's workforce are not union members (available at: [http://www.apf.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committee/s?url=ee/fairwork13/subs.htm](http://www.apf.gov.au/parliamentary_business/committees/house_of_representatives_committee/s?url=ee/fairwork13/subs.htm)).

Since 1 January 2014 the Fair Work Commission has a new power to resolve disputes about frequency of right of entry visits, however the high threshold to be met before the Commission can exercise its power means that it is likely to have little practical impact. The Commission must be satisfied that the frequency of visits would require an unreasonable diversion of the employer's 'critical resources', a test that will be difficult for the majority of employers to meet in the industries most impacted by frequency problems. Evidence presented to the Review Panel indicated that the problem is largely confined to employers on major projects (page 193), who are unlikely to be able to meet the 'critical resources' test in any circumstances. This is due to the fact that a project may have a large number of employees on site and the employees responsible for escorting union officials for right of entry purposes are not likely to be a critical resource in the construction/production process.

There is also a new obligation (since 1 January 2014) on employers to facilitate transport to, and/or provide accommodation at, remote sites where no other transport or accommodation is available. In addition to the usual costs associated with such visits including ensuring work health and safety requirements are met and escorting officials, other ancillary costs incurred by an employer in organising transport and accommodation for union officials will also not be recoverable from the union official or their union. Such ancillary costs include allocating staff to organise the visits which would include booking relevant transport, liaising with the union official and/or the union about the arrangements and ensuring there is adequate accommodation available on site. The employer would also have the burden of arranging the recovery of costs from the union official or union. This obligation, which was implemented through the *Fair Work Amendment Act 2013*, was not recommended by the Review Panel.

The Policy also undertakes to require photographic permits for union officials. Currently right of entry permits are not photographic and photographic identification is not required to be presented, meaning that employers are unable to verify the identity of union officials. This has the potential to allow a person other than the union official to gain entry to a workplace. This poses both commercial privacy and security risks.

### 3.2 Objective

Unions have a legitimate role in the representation of employees and their workplace rights. However, it is important that this is appropriately balanced with the need for employers and employees to carry out their work without undue disruption. The objective is to obtain a more appropriate balance by reducing the disruption to employers and employees caused by right of entry visits for discussion purposes and ensure appropriate safeguards are in place so that right of entry rules are not exploited.

### 3.3 Options

#### 3.3.1 Option One – Maintain the status quo

If the status quo is maintained union officials will continue to be subject to the requirements of the Fair Work Act when exercising a right of entry. Given that the Review Panel received many submissions raising concerns that the Fair Work Act had led to more frequent right of entry visits and found there had been overly frequent visits by some unions in some workplaces (page 193), it is likely that excessive and disruptive right of entry visits will continue.

It is also unlikely that the Fair Work Commission will be able to provide practical assistance to effectively deal with frequency disputes because most affected employers will not be able to satisfy the criteria that excessive visits has caused an unreasonable diversion of their ‘critical resources’.

#### 3.3.2 Option Two – Implement the Government’s right of entry reforms

Option two is to implement the Government’s proposed right of entry reforms outlined in its Policy.

This option involves narrowing the circumstances when unions can enter workplaces for discussion purposes. Workplace access rights will be based on the principles of a union having a recognised representative role at the workplace and employees wishing to have discussions with that union.

Under this option the Fair Work Commission’s power to deal with disputes about the frequency of right of entry visits will be strengthened. This will be done by allowing the Commission to make orders to resolve such disputes when satisfied there has been an excessive number of right of entry visits to a workplace. This approach is consistent with recommendation 35 of the Review Panel (see page 195).

This option also involves repealing the amendments introduced by the *Fair Work Amendment Act 2013* to allow union officials to hold discussions in lunch or meal rooms as a default and requiring employers to facilitate transport to, and/or accommodation at, remote sites where no other transport or accommodation is available.

Finally this option will involve requiring entry permits, issued by the Fair Work Commission, to include a photograph of the union official to assist employers in verifying the identity of those persons seeking to enter their workplace.

### 3.4 Impact Analysis

#### 3.4.1 Option One – Maintain the status quo

##### Prevalence of the problem

Many employers and employer representatives raised concerns about the operation of the right of entry provisions in submissions to the Review Panel and during the Parliament’s consideration of the *Fair Work Amendment Act 2013*, which made a number of amendments to the provisions. The level of concern raised by stakeholders since the commencement of the Fair Work Act 2009 indicates that the problem is significant for some employers and widespread.



### Benefits

The main benefit of maintaining the status quo is that all parties will continue to operate under the existing system, without any need to familiarise themselves with further new rules.

The Fair Work Commission will have the power to deal with some disputes about the frequency of right of entry visits by union officials to some workplaces. This could result in orders being made to prevent excessive visits at some workplaces.

Additionally, the Fair Work Commission will not have to introduce new photographic entry permits.

### Costs

If the status quo is maintained, excessive right of entry visits will continue and may increase. This has the potential to reduce productivity at some workplaces.

Evidence submitted to the Review Panel by the Chamber of Commerce and Industry of Western Australia reported that each visit requires between 60 and 90 minutes for the employer to deal with, and up to 3.5 hours on remote sites (page 193). Furthermore, it was identified in the submission that employers have additional costs associated with providing vehicles to facilitate transport onsite in some instances and training staff to assess eligibility for entry (page 193).

The Review Panel noted that employers may need to set aside time and resources to attend to more frequent entry requests (page 194). With evidence presented to the Fair Work Act Review of as many as 700 right of entry visits a year at some workplaces, the cost to employers of facilitating entry will remain significant if the status quo is maintained (page 193).

The new provisions to facilitate right of entry at remote sites will have the added ongoing cost of facilitating transport to, and/or accommodation at, workplaces for union officials.

Maintaining the right of union officials to hold discussions with employees in the lunch or break room at a workplace by default risks disruption of employees during their meal or other breaks.

Without effective arrangements in place to ensure that union officials' identities can be verified there are risks of unauthorised entry to workplaces by persons misusing permits.

#### *3.4.2 Option Two – Implement the Government's right of entry reforms*

### Benefits

If implemented, option two will decrease the costs for employers associated with facilitating excessive right of entry visits. Consequentially, with fewer resources required to manage right of entry visits and related requirements, including transport and/or accommodation for union officials wishing to visit remote sites, employers will benefit from an increase in productivity. The reforms will be particularly beneficial for employers currently experiencing or likely to experience excessive right of entry visits.

Benefits to productivity will also flow from a reduction in disputes about frequency of visits, as well as disputes being resolved more quickly due to the Fair Work Commission's more effective powers to deal with such disputes.

Employees will be positively impacted by reducing the likelihood of union officials disrupting lunch and meal breaks by holding discussions in the lunch or meal room at the workplace. This will ensure that employees can enjoy their breaks in the locations allocated for this purpose without uninvited interruption.

### Costs

The requirement for photographic entry permits may have a minor impact on union officials as they will need to obtain a new entry permit from the Fair Work Commission. The Fair Work Commission will retain responsibility for issuing entry permits.

## **3.5 Regulatory cost calculations**

### *3.5.1 Frequency of visits*

The Department has identified reductions in regulatory costs associated with proposed changes to union right of entry laws to reduce the frequency of union visits to workplaces for discussion purposes in circumstances where there is an excessive number of visits. The reforms will reduce the costs to business associated with the administration and oversight of such visits.

The Fair Work Act Review found that the number of right of entry visits by some unions to some workplaces was excessive, based on evidence provided by a number of employers and their representatives. Excessive visits were predominantly raised as a concern in the building and construction and mining industries, however the problem is also understood to be evident in other industries.

The Department has quantified the cost reduction for businesses which are likely to be most affected by the change in right of entry, namely businesses involved in resource projects. This assumption is supported by the submissions provided to the Review by employers and their representatives in the resource and construction industries, including BHP Billiton and the Chamber of Commerce and Industry of Western Australia (CCIWA). The Review Panel noted that submissions “suggest that the issue is a more significant problem for large worksites... such as those in the mining and construction industries” (page 193).

Details regarding entry rights were detailed during the Fair Work Act Review and accepted by the Review Panel when making recommendation 35. Data and evidence provided to the Review Panel is used as a model for costing savings from the regulation change.

While the focus of the costing is on businesses most significantly impacted by excessive right of entry visits it is recognised that there are many others outside of those considered here which will benefit from the Government’s reforms through a reduction in union official visits.

### Number of visits for discussion purposes

In its submission to the Review, BHP Billiton (BHP) provided data on the number of statutory rights of entry undertaken in the last five years at its Worsley Alumina plant in Western Australia. Based on the information provided by BHP, between 2009 and 2011 there were around 630 union official visits per year on average (page 193).

The evidence provided by BHP is supported by the CCIWA submission to the Review Panel, which put the number of visits at 700 per year for onshore resource construction projects. The

Review Panel also cited a Fair Work Commission matter where an employer gave evidence of over 200 entry requests being made in just under a four month period (page 193).

BHP did not differentiate between entry permits for discussion purposes or to investigate a contravention, however, the Review Panel remarked that in general terms, it “seems unlikely that the incidence of visits to a workplace to investigate a suspected contravention would be high” (page 194). This is particularly the case given the significantly higher threshold that applies to entry for investigation purposes, which includes that:

- the alleged breach must relate to a union member working at the premises;
- there must be a reasonable suspicion that a contravention has occurred or is occurring; and
- the entry notice must specify details of the alleged contravention.

On this basis, the Department has assumed that around 10 per cent of visits are to investigate a contravention. Therefore, of the 630 visits made each year to each large resource project it is estimated that there would be around 570 visits per year for discussion purposes at each large resource project.

The Department estimates that under the proposed changes each large resource project workplace would experience 260 fewer visits for discussion purposes each year. This is calculated on the assumption that there is on average around six unions entering each large project, each conducting one visit per week. This will result in each workplace experiencing a total of around 310 right of entry visits per year. The total reduction of 260 visits per workplace per year is calculated by subtracting the number of visits that will continue as a result of the proposed changes (310) from the total number of visits for discussion purposes (570).

### Costs

The main costs associated with the offset are administrative costs. This includes time for an employee to process the visit request and to oversee the visit.

In its submission to the Review, CCIWA submitted that “the average time taken by projects to deal with each visit was between 60 and 90 minutes, and up 3.5 hours on remote projects” (page 193). Based on this it is assumed that on average a right of entry visit takes two hours labour time to process and oversee.

It is assumed that the administrative tasks undertaken to process and oversee union visits is performed by an employee at the classification Human Resources and Recruitment – Management in Table 3 (\$86.45 per hour). The Department has updated the employee earnings based on stakeholder feedback on the Options Stage RIS. The Department has used job titles and average yearly salaries before tax drawn from the MyCareer Salary Centre for the December 2013 quarter. Weekly earnings have been calculated by dividing the annual salary by 52 weeks and hourly rates of pay have been calculated by dividing the weekly amount by 38 hours.

**Table 3 – Employee earnings**

<b>Classification</b>	<b>Weekly earnings</b>	<b>Hourly rate</b>
Human Resources and Recruitment- Management	\$3285	\$86.45
Accounting – Financial Accounting	\$1789	\$47.10
Mining – Environment/Health and Safety	\$2848	\$74.97

The Department expects that frequent union visits also occupy the time of senior decision-makers involved in projects and divert security personnel toward overseeing union visits, however these have not be costed due to a lack of reliable data.

#### Number of business affected

The Bureau of Resources and Energy Economics (BREE) publishes research on major resource and energy projects in Australia and their stage of completion. Most recent data show that at October 2013, 63 projects were at the Committed Stage. Projects at this stage have either started construction or are preparing to start construction.

A review of the data shows that the number of major projects reaching completion has been steady over the past 18 months (see Resources and Major Projects April 2013, page 20 and Resources and Major Projects October 2012, page 25) suggesting that this level of activity will continue.

Projects at the Completed Stage and Committed Stage are both likely to receive union visits. It is estimated that, based on evidence presented to the Review Panel, around 100 such projects at the Committed and Completed Stage would be experiencing high-level right of entry visitations.

On the assumption that 100 major projects would each experience 260 fewer union visits for discussion purposes per year, thereby saving two hours' in labour costs, the proposed changes would result in a total compliance cost saving of around \$5,214,560 per year.

#### *3.5.2 Repeal of right of entry accommodation and transport provisions*

The Government proposes to repeal an amendment made by the previous government through the *Fair Work Amendment Act 2013* which requires occupiers of remote sites (employers) to facilitate transport to, and/or provide accommodation at, those sites if no other transport or accommodation is available for unions seeking to access remote worksites.

The Department considers that the vast majority of remote sites where these arrangements might apply would be offshore work sites, mining sites and mining construction sites.

Data from the National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA) indicates that in 2012 there were 151 active offshore facilities. Due to the geographical application of the Fair Work Act, it is estimated that around 80 per cent of these facilities would be subject to the 'remote' worksite provisions. Therefore around 120 of the remote sites within NOPSEMA's jurisdiction would potentially be affected by the proposed changes.

Based on data from BREE and GeoScience Australia there were around 470 operating mines and resource and energy major projects at a Committed Stage at October 2012. Projects at a Committed Stage are typically commencing construction and would therefore be a workplace at which a union could exercise a right of entry. Given the provisions apply only to 'remote' sites which are not reasonably accessible, the Department estimates that around 10 per cent of the 470 sites, that is 47, would be 'remote' sites.

On this basis, around 167 sites (120 offshore facilities and 47 mining or mining construction sites) across Australia are likely to be considered 'remote' for the purposes of the provisions.

As noted above, the provisions enable a business to recover the cost of providing transport and/or accommodation to the union official, but do not allow for the recovery of ancillary costs, such as administration and wages of employees facilitating visits. As the provisions came into effect so recently (1 January 2014), it is difficult to determine the exact cost of the requirement to provide access to transport and accommodation on remote worksites.

In estimating the cost of facilitating transport and/or accommodation arrangements the Department has used job titles and average yearly salaries before tax in the mining, oil and gas sector, drawn from the MyCareer Salary Centre. Hourly rates of pay have been calculated by dividing the yearly salary by 52 weeks and dividing that figure by 38 hours.

#### Visit coordination

Staff would be required to manage logistics for a visit, involving organising accommodation and travel arrangements, including liaising with relevant service providers such as travel providers, caterers and accommodation providers, and liaising with the union and union official. The Department anticipates that for each visit by a union official it would take an employee at the classification of Mining – Environment/Health and Safety in Table 3, at the rate of \$74.97, around 3 hours to deal with the visit.

#### Workplace relations specialist

A workplace relations representative, work health and safety officer or equivalent staff member would be required in most instances to escort the union official for the entirety of their visit. The Department expects that this would require around 8 hours paid time for each visit for an employee at the classification of Human Resources and Recruitment – Management (\$86.45 per hour) in Table 3.

#### Invoicing

Staff would be required to seek reimbursement of transport and accommodation costs from the relevant union. The Department estimates that this would require one and a half hours labour by an employee at the Accounting – Financial Accounting classification in Table 3, or equivalently paid person, at a rate of \$47.10 per hour. In some instances there may be disputes about the reasonableness of the costs, which would require additional time, however this has not been included in the costing.

Based on calculations from the business cost calculator, including on-costs, an employee at the classification Mining - Environment/Health and Safety (Table 3) would be paid around \$260.91 per visit, an employee at the classification of Human Resources and Recruitment- Management (Table 3) would be paid \$802.24 per visit and an employee at the classification of Accounting – Financial Accounting (Table 3) would be paid \$81.96 per visit, total salaries paid for each visit

would amount to approximately \$1145.11. It estimated that each of the 167 remote worksites would experience an average of two union visits per year therefore each business would spend approximately \$2290 per year.

The total compliance cost saving resulting from the proposed repeal, calculated using the business cost calculator to include automatic labour on-costs, would therefore be around \$382,466 each year.

The cost offsets in Table 4 below have been costed using the business cost calculator.

**Table 4 - Annual cost offset**

	<b>Agency</b>	<b>Within portfolio</b>	<b>Outside portfolio</b>	<b>Total</b>
Business	\$0	\$5,597,026	\$0	\$5,597,026
Not-for-profit	\$0	\$0	\$0	\$0
Individuals	\$0	\$0	\$0	\$0
Total	\$0	\$5,597,026	\$0	\$5,597,026

## 4. Individual Flexibility Arrangements

Employees and employers are able to achieve flexibility in the workplace through individual flexibility arrangements (IFAs) under the Fair Work Act. IFAs vary terms of modern awards or enterprise agreements in order to meet the genuine needs of employers and individual employees, while ensuring that employees are better off overall.

Flexible work practices deliver benefits to both employees and employers. Use of IFAs can lead to greater job satisfaction, improve the ability for employees to manage outside-of-work responsibilities and help employers to attract and retain staff. Flexibility in the workplace can also improve workplace productivity and efficiency by helping maintain a motivated workforce with reduced staff turnover and absenteeism.

To ensure that employees and employers are able to make fair and protected flexible workplace arrangements, the Policy proposes implementing the Review Panel's Recommendation 24. Specifically, the proposed amendment will ensure that enterprise agreements cannot restrict the scope of IFAs, while ensuring that employees who are party to an IFA will be better off overall. This will give effect to election commitments made by the Government's Policy.

### 4.1 Problem

Under section 202 of the Fair Work Act, an enterprise agreement must include a 'flexibility term' that enables an employee and his or her employer to agree to an IFA. If an enterprise agreement does not include a flexibility term, the model flexibility term set out in the Fair Work Regulations will apply. An IFA has effect as if it were a term of an enterprise agreement and can be enforced as such.

The current legislation allows the content of flexibility terms in enterprise agreements to be narrower in scope than the model flexibility term. This means that employees covered by an enterprise agreement may be denied the opportunity for more suitable workplace arrangements even if their employer agrees.

The Review Panel highlighted a number of deficiencies with the current regulation of IFAs, including the restrictive nature of flexibility terms in enterprise agreements.

The Department of Education, Employment and Workplace Relations' submission to the Review Panel noted that the model term, or terms that provide for unrestricted flexibility, were included in 57.4 per cent of Fair Work Act enterprise agreements approved between 1 July 2009 and 30 September 2011, covering 60.8 percent of employees (page 164).

The submissions to the Review Panel indicated that in many cases neither employees nor employers were satisfied with the current IFA provisions, with many proposing that the model flexibility term operate as a mandatory minimum in enterprise agreements, with an ability to bargain for greater flexibility (page 163).

In concluding its findings, the Review Panel stated that flexibility terms have not always allowed for genuine flexibility. In order to create an opportunity for greater use of IFAs, the Review Panel found that 'matters covered by the model flexibility term should be included in all enterprise agreements as the minimum matters over which a flexibility term is permitted, with bargaining representatives having the capacity to negotiate for additional flexibility if they so wish' (page 164 ).

## 4.2 Objective

Currently, IFAs are available for employers and employees to use in order to achieve workplace flexibility. However, whilst flexibility terms may be widely included in agreements, there is evidence that these are not being widely used and their content is restricted in enterprise agreements (as discussed above in [4.1 Problem](#)). The objective of the proposal is to support employers and employees to make IFAs to create flexible work practices that enhance productivity and job satisfaction, while retaining the better off overall test and other measures to ensure employees are protected.

## 4.3 Options

### 4.3.1 Option One – Maintain the status quo

The requirements to be met by a flexibility term are outlined in section 203 of the Fair Work Act, including that it must be in writing and that the employer must ensure the employee covered by the IFA is better off overall in comparison with the enterprise agreement or modern award it varies.

If the status quo is maintained, IFAs made under enterprise agreements will continue to be regulated by the relevant sections of Fair Work Act and the model flexibility term in Schedule 2.2 of the Fair Work Regulations.

If the status quo is retained, the ability to restrict the scope of terms that can be included in an IFA made under an enterprise agreement will continue, as flexibility terms can currently be restricted in enterprise agreements through the negotiation process. This will continue to limit the potential for employees and employers to enjoy the potential flexibility and productivity that could derive from less restricted IFAs.

### 4.3.2 Option Two – Implement Review Panel Recommendation 24

The Review Panel recommended that section 203 of the Fair Work Act be amended to broaden the scope of terms to be included in IFAs in enterprise agreements (page 164). Recommendation 24 reads:

*The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties (page 164).*

The Policy outlines the intention to implement this Review Panel recommendation so that IFAs can be made about all of the five minimum matters listed in the paragraph 1(a) of the model flexibility term in Schedule 2.2 of the Fair Work Regulations. The five minimum matters are: arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading.

Specifically, section 203 will be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the Fair Work Regulations along with any additional matters agreed by the parties.



Employees covered by an enterprise agreement will have the opportunity to develop more suitable workplace arrangements with their employer's agreement. The removal of restrictions will allow employees to work more flexibly and to suit their personal situation, while remaining better off overall. Under the legislation IFAs are subject to the 'better off overall test', which requires that the employee must be 'better off overall' under the IFA than they would be under the relevant modern award or enterprise agreement. Additionally, this approach will align with the approach generally taken in model flexibility clauses in modern awards.

#### **4.4 Impact analysis**

The status quo, as outlined in option one above, has been used as the benchmark to examine the costs and benefits of the proposed amendments under option two. The analysis focuses on the effects of expanding the range of terms that employers and employees can utilise in IFAs, as is proposed in Recommendation 24.

Overall, implementing Recommendation 24 will make it easier for employees and employers to create genuinely flexible and productive IFAs in Australian workplaces while still ensuring protection for employees.

*The General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012* (the General Manager's Report) highlighted a number of reasons as to why employers are reluctant to consider IFAs, including that IFAs do not allow sufficient flexibility (General Manager's Report, page 41).

This is supported by the Review Panel's findings that flexibility terms in enterprise agreements do not always allow for the scope of flexibility that was intended (page 164). Additionally, the reasons provided in submissions to the Review Panel for not entering into IFAs included that the flexibility terms that unions and employers negotiate during enterprise bargaining are often narrower than the model flexibility term (page 163). The evidence for the Review Report was gathered from organisations of all sizes across various industries.

##### *4.4.1 Option One – Maintain the status quo*

Option one maintains the status quo. It has been used as the benchmark for considering the costs and benefits of the two options.

#### Benefits

Employers and employees would continue to access the IFA scheme in the legislation, despite any restrictions in enterprise agreements.

The General Manager's Report identifies many perceived benefits of IFAs to employees and employers. Employees identified benefits relating to take-home pay, superannuation, leave arrangements and flexibility for family reasons. Employers identified benefits relating to rostering, reduced costs, staff attraction and retention and improved efficiency or productivity of staff (General Manager's Report, page 67-68).

#### Costs

A significant cost of option one is that the legislation currently permits limiting the potential for employees and employers to enjoy the full benefits of IFAs, particularly given parties already recognise the significant benefits that can stem from IFAs. If the current arrangements are

maintained, some employers and employees will not have the opportunity to enjoy the potential benefits of workplace flexibility.

In their submissions to the reviews, employers have noted that there are flow-on costs of IFAs not providing genuine flexibility (General Manager's Report, page 41; Review Report, page 106), most specifically being a lack of meaningful flexibility in the workplace and therefore less opportunity to harness increased productivity (General Manager's Report, page 93).

With regard to employees, there are many published and well recognised costs associated with a lack of flexibility in the workplace or 'work-life balance'. These costs include a negative impact on mental and physical health and interference with family relationships.

#### *4.4.2 Option Two – Implement Review Panel Recommendation 24*

Implementing Recommendation 24 will enable all employers and employees covered by an enterprise agreement to negotiate an IFA on any of the five minimum matters listed in the model flexibility term, and can include any additional matters that are agreed during enterprise bargaining.

#### Benefits

The benefits of option one will continue under option two, however, these will be enhanced to ensure increased access to flexibility for employers and employees.

In particular, a significant benefit of option two is that employers and employees will be freer to negotiate individual arrangements that suit the needs of the employee and the requirements of the business. As the better off overall test will continue to apply and because IFAs must be genuinely agreed to between the parties, improved workplace arrangements will be ensured for both employees and their employers. Consequently, these factors are likely to increase the use of IFAs in Australian workplaces.

Given the benefits of IFAs identified by the General Manager's Report (page 67-68), it is reasonable to assume that a higher prevalence of genuinely flexible IFAs could strengthen those benefits identified for employees and employers in option one and make their use more widespread across Australian workplaces.

The proposal will guarantee that all employees will have access to fair flexibility regardless of whether they are covered by the model flexibility term or not.

#### Costs

The intention of the proposal is to ensure IFAs can be made on a range of issues broad enough to suit the individual needs of employees and employers. It is foreseeable that following implementation of the proposal, unions may seek to restrict a flexibility term in enterprise agreement negotiations to cover only the five minimum matters in the model flexibility term, rather than also including any additional matters.

## 5. Annual Leave Loading

### 5.1 Problem

The Review Panel noted in its Review Report that annual leave loading was originally provided to compensate employees for the notional loss of overtime earnings while on leave (page 99). The benefit has since spread to most sectors of the workforce, including areas not generally subject to overtime payments.

Section 90(2) of the Fair Work Act provides that if on termination an employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave. The Fair Work Ombudsman expressed a non-authoritative view that this meant that if an employee is entitled under an industrial instrument to leave loading when they take annual leave it must be included in the amount paid on termination for untaken leave. This view was not universally accepted as correct.

As section 90(2) is part of the National Employment Standards (NES) it is a minimum standard of employment that cannot be reduced by an industrial instrument. Under the Fair Work Ombudsman's view, leave loading is therefore payable to employees regardless of any provisions to the contrary in the relevant industrial instrument. This conflicts with the longstanding position prior to the Fair Work Act whereby leave loading was not payable on termination unless expressly provided for in the relevant industrial instrument. 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.

It is not possible to precisely determine what proportion of Australian employees have their pay set by a modern award. Australian Bureau of Statistics data shows that in May 2012 16 per cent of employees had their pay set by award and 42 per cent of employees had their pay set by collective agreements. However, as this includes employees covered by state industrial relations legislation it is not possible to extrapolate from this the proportion of employees who are covered by modern awards or enterprise agreements made under the Fair Work Act. Further, there is no way to ascertain how many employees have their pay set by each modern award, as coverage figures are not measured. This is further complicated by the fact that in many workplaces modern awards are supplanted or supplemented by an enterprise agreement, and reliable data is not available on annual leave loading payable under enterprise agreements.

Employers who, prior to the Fair Work Act, did not have to pay annual leave loading on an employee's termination of employment, have incurred an additional cost in paying out the annual leave on termination as required by section 90(2). Leave loading typically amounts to 17.5 per cent of an employee's base rate of pay, depending on the relevant modern award or enterprise agreement.

Many stakeholders raised concerns about this issue with the Review Panel in submissions and during meetings. Stakeholders were concerned that the Fair Work Act had displaced the longstanding position that annual leave loading is only payable to an employee on termination if expressly provided for in the relevant agreement or award, and this change has resulted in additional costs for a large number of employers (page 99-100).

As the provision of the Fair Work Act which displaces the longstanding position does not expressly state that annual leave loading is payable on termination, this is not clearly understood by all stakeholders. The Review Panel noted that many employer representatives dispute the interpretation of this provision (page 100), a view which was reiterated during consultation with stakeholders. This creates confusion for, and disputes between, employees and employers.

## **5.2 Objective**

The objective is to reinstate the longstanding and well understood position that was in place prior to the Fair Work Act to provide that leave loading is only payable on termination if expressly provided for in the relevant industrial instrument. This will reduce confusion and provide certainty on the issue for employers and employees.

## **5.3 Options**

### *5.3.1 Option One – Maintain the Status quo*

If the status quo is maintained, employers will continue to be required to pay annual leave loading on termination to employees who are entitled to the loading when taking annual leave, even when this is ruled out by their relevant industrial instrument. This typically amounts to a loading of 17.5 per cent on top of an employee's base rate of pay for any untaken annual leave on termination.

### *5.3.2 Option Two – Make annual leave loading payable on termination where for provided under the relevant industrial instrument*

Option two would involve restoring the longstanding position that was in place prior to the introduction of the Fair Work Act, as recommended by the Review Panel (page 100). This would require employees to be paid annual leave loading on termination for any period of untaken annual leave only when this is expressly provided for under the applicable modern award or enterprise agreement. Employees would still be entitled to be paid for outstanding annual leave.

This approach would still enable leave loading to be paid on termination, as long the entitlement is expressly provided for in an enterprise agreement or modern award.

## **5.4 Impact Analysis**

### *5.4.1 Option One – Maintain the status quo*

#### Benefit

The benefit of maintaining the status quo is that all employees in the national workplace relations system who are covered by an industrial instrument that provides for annual leave loading will continue to be entitled to that amount of loading on annual leave they have not taken when they separate from their employer.

#### Cost

Maintaining the status quo will continue to have the potentially significant cost for employers of having to pay annual leave loading to employees on termination for any untaken annual leave, even where the relevant agreement or award provides otherwise. For many employers this cost

may be unforeseen, particularly when the relevant industrial instrument expressly provides that annual leave loading is not payable on termination.

Currently there are 19 modern awards (around 17 per cent of all modern awards) that expressly provide that annual leave loading is not payable on termination. If the status quo is maintained employers will continue to be liable for annual leave loading on termination for employees covered by these awards. There are also 77 modern awards which contain an entitlement to annual leave loading that are silent whether annual leave loading is to be paid on termination. The status quo requires these employers to pay annual leave loading on termination whereas they would not have been liable for these payments under the longstanding position which was replaced by the Fair Work Act.

It is not possible to determine how many employees are currently entitled to annual leave loading for a number of reasons. In relation to modern awards this is because in many workplaces the modern awards have been supplanted or supplemented by an enterprise agreement which may provide different conditions. For example, annual leave loading payable under the award may have been absorbed into a higher salary payable under an enterprise agreement. Additionally, in relation to modern awards and enterprise agreements, not all employees covered by the instrument may be entitled to annual leave loading, such as casual employees or those in specific roles excluded from the entitlement.

In relation to enterprise agreements the Department is not able to disaggregate the operation of annual leave loading terms, which may, for example, confirm or remove the entitlement for some or all employees. Application of any annual leave loading entitlement for each enterprise agreement can also not be ascertained due to information not being available on who may or may not be entitled to it, for example, how many employees are casual and therefore not entitled to leave loading. The database also does not include data on agreements that are still operational but have passed their nominal expiry date.

#### *5.4.2 Option Two – Make annual leave loading payable on termination where provided for under the relevant industrial instrument*

##### Benefit

Option two would implement the recommendation of the Review Panel (Recommendation 6) that the longstanding position be reinstated. Recommendation 6 reads:

*The Panel recommends 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 (page 100).*

The benefits of reinstating the longstanding position are twofold—it will reduce unforeseen costs for many employers and will provide certainty for employers and employees. Specifically, option two would represent a reduction in costs for employers who have had to pay leave loading on unused leave to employees on termination because of the operation of section 90(2) of the Fair Work Act despite express provisions in the applicable modern award or enterprise agreement to the contrary.

This option will also provide clarity to employers and employees, avoiding disputes that may arise because of a lack of awareness that the longstanding position had been displaced by the Fair Work Act.

## Cost

Option two would see a reduction in entitlements for employees who have, since 2010, received annual leave loading on unused leave on termination, despite not previously being entitled to the loading in those circumstances. It is not possible to determine how many employees are currently entitled to annual leave loading. However, any adjustment to entitlements is made to the state of affairs brought about by the view expressed by the Fair Work Ombudsman.

Further, the adjustment is contingent and would have an impact on employees in particular circumstances, that is, employees whose employment is terminated, have an annual leave accrual, have an entitlement to annual leave loading, and are covered by an instrument that does not explicitly provide that the loading is payable on termination.

The position of affected employees would be as it was prior to the Fair Work Ombudsman's expressed view. Compared to the position under the Fair Work Ombudsman's view, this would equate to the loss of a loading of around 17.5 percent on top of any annual leave owed to them. However, affected employees would not have had this entitlement prior to the commencement of the relevant provisions of the Fair Work Act and will continue to be entitled to their base rate of pay for any period of untaken annual leave.

Option two has no impact on employees not entitled to annual leave loading.

## **6. Transfer of business**

### **6.1 Problem**

The transfer of business provisions under the Fair Work Act provide protections for employees in situations where a business is transferred from one national system employer to another. Under these provisions an award or agreement or another type of ‘transferable instrument’ follows the employee and becomes binding on the new employer. The purpose of these provisions is to ensure employees’ wages and conditions are not diminished in circumstances where for example a business changes hands or a business restructures its operations.

Employers can seek an order from the Fair Work Commission to stop the transfer of an award or agreement. The Review Panel noted this imposes an unnecessary administrative burden on employers where an employee has voluntarily transferred between associated entities (page 206). This is because in this situation the employee has retained control over whether they wish to transfer to the new terms and conditions, as they do so voluntarily.

### **6.2 Objective**

The objective of amending the transfer of business rules is to reduce red tape associated with having to seek an order from the Fair Work Commission to stop an employee’s industrial instrument transferring where they have transferred on their own initiative between associated entities. The removal of this red tape will also encourage increased voluntary transfers between associated entities to the benefit of both employees and employers.

Transfer of business red tape is quantified as time and wages to prepare an application to stop the instrument transferring, negotiate union support for the application and prepare for a Fair Work Commission hearing. If an employer chooses not to seek an order from the Fair Work Commission, the industrial instrument will transfer with the employee, resulting in the significant cost of having to maintain multiple payroll systems due to the same group of employees being covered by more than one instrument.

### **6.3 Options**

#### *6.3.1 Option One – Maintain the status quo*

Under this option employers will be required to continue to seek an order from the Fair Work Commission where an employee moves, on their initiative, between two associated business entities.

#### *6.3.2 Option Two Employees who voluntarily transfer be subject to the terms and conditions of employment provided by the new employer*

This option implements Recommendation 38 made by the Review Panel by amending section 311 of the Fair Work Act to make it clear that when employees seek to transfer on their own initiative to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer. Recommendation 38 reads:

The Panel recommends that section 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 (page 206).

## **6.4 Impact analysis**

### *6.4.1 Option One – Maintain the status quo*

Maintaining the status quo will continue to require employers to seek an order from the Fair Work Commission to stop an employee's industrial instrument transferring to the new employer where an employee voluntarily moves between two employers that are associated entities.

Option one will continue to place an administrative burden on employers in terms of time and resources in preparing an application to the Fair Work Commission, and as noted by the Review Panel may diminish 'opportunities for employees within the group structure due to the cost of seeking an order' (page 207). Alternatively the employer will have the cost of having different industrial instruments applying to the same group of employees.

While the quantified costs identified are not significant, the effect of maintaining the status quo would potentially reduce mobility for employees between associated entities and the benefits this may have delivered to employees and their employers.

### *6.4.2 Option Two – Employees who transfer on their own initiative be subject to the terms and conditions of employment provided by the new employer*

This option will reduce the burden on employers of having to comply with administrative red tape following voluntary movements of employees between associated entities. It will reduce costs associated with an employer having to comply with a new industrial instrument that transfers with the transferred employee or the alternative of having to seek an order from the Fair Work Commission to stop an instrument transferring.

The Review Panel considered that amending section 311 is likely to have a positive impact for employees as it will encourage greater mobility, as well as benefitting the new employer of having experienced staff transferring to undertake the relevant work (page 207).

An amendment to section 311 was considered by the Review Panel as unlikely to increase the risks to employees of having their terms and condition of employment diminished through transfers to associated entities (page 206). The Review Panel's report noted that the Fair Work Commission has given weight to the fact that employees are transferring of their own initiative with an understanding of the terms and conditions of employment, in deciding that an industrial instrument should not transfer (page 206).

In addition, the Review Panel considered that while the process is relatively straightforward, it unnecessarily ties up parties' time (including that of the Fair Work Commission) in dealing with matters that could be resolved without recourse to the tribunal (pages 203-4).

## **6.5 Regulatory cost calculations**

The Review Panel found that there was scope to reduce costs on employers through changes to treatment of transfer of business situations where an employee transfers voluntarily between two associated entities (see page 205). Under current rules, employees remain covered by their transferring instrument, in some cases, to their detriment. In these cases, employers are required to make an application to the Fair Work Commission for an order that the new employer's instrument applies to the employee.



The main costs associated with these transfers are administrative and relate to labour costs required to secure orders from the Fair Work Commission by making an application under section 318. The Fair Work Commission does not charge a fee to make an application under section 318, although the Review Panel noted that changes could 'spare both parties the time and expense of making such an application' (page 206). There are also administrative efficiencies for employers who will no longer be required to maintain two different payroll systems in the event that the Fair Work Commission declines to make an order and the employee's instrument of appointment transfers with them.

To determine the reduction in the number of application processes caused by the change, the Department has analysed recent data regarding section 318 applications. The Fair Work Commission produces quarterly reports that collate information on various applications made under the Fair Work Act.

Over the 24 months to the end of September 2013 there were 137 applications and 114 orders granted under section 318. This translates to almost 70 applications per year. While there has been a slight increase in the July – September 2013 quarter, the number of applications per year has remained relatively stable. Based on this, it is assumed that employers will continue to make around 70 applications under section 318 per year.

The Review Panel found that most applications were granted and hearings were generally between half an hour and an hour. The Department analysed applications that have been made in regard to voluntary employee transfers. Based on this analysis, the Department estimates that around 10 per cent of section 318 applications deal with voluntary employee transfers.

The issue of voluntary employee transfer was highlighted by Qantas in its submission to the Review Panel. Qantas noted that all applications it has made in relation to voluntarily transferring employees have been successful, but that time and resources are required to prepare applications and secure union support (page 205).

Preparation for and representation at the Fair Work Commission hearing would be conducted by two employees, at the classifications in Table 5 as follows, one Human Resources and Recruitment - Management and one Human Resources and Recruitment – Industrial Relations. To maintain consistency in this RIS the Department has updated the job titles and average yearly salaries before tax drawn to use the MyCareer Salary Centre data for the December 2013 quarter. Weekly earnings have been calculated by dividing the annual salary by 52 weeks and hourly rates of pay have been calculated by dividing the weekly amount by 38 hours.

**Table 5 - Employee earnings**

<b>Classification</b>	<b>Weekly earnings</b>	<b>Hourly rate</b>
Human Resources and Recruitment - Management	\$3285	\$86.45
Human Resources and Recruitment - Industrial Relations	\$2140	\$56.32

The cost offset estimate in table 6 below has been made on the assumption that it would take around a week for the team acting for the employer to prepare the application, negotiate union

support and prepare for the Fair Work Commission hearing. This assumption is informed by the findings of the Review Panel.

There are also likely to be a number of businesses where employees have transferred voluntarily and employers have not applied to the Fair Work Commission for an order under section 318. Under the regulation change, these businesses would no longer need to maintain a separate payroll system for the transferring employee. The offset includes efficiencies derived from employers being relieved from running multiple pay roll systems due to multiple agreement coverage for the same groups of employees.

In the absence of any data on the number of employers in this category, a conservative estimate is that the number of employers who do not apply for Fair Work Commission orders when an employee transfers voluntarily is equal to those that do apply for orders. An administrative cost saving has been included for these employers.

The annual cost offset has been calculated using the Business Cost Calculator.

**Table 6 - Annual cost offset**

	<b>Agency</b>	<b>Within portfolio</b>	<b>Outside portfolio</b>	<b>Total</b>
Business	\$0	\$95,112	\$0	\$95,112
Not-for-profit	\$0	\$0	\$0	\$0
Individuals	\$0	\$0	\$0	\$0
Total	\$0	\$95,112	\$0	\$95,112

## **7. Meeting to discuss extensions of unpaid parental leave**

### **7.1 Problem**

The NES contained in Part 2-2 of the Fair Work Act provide employees with a leave entitlement and return-to-work guarantee when taking parental leave. The provisions are intended to maintain the long-term employment relationship between the parents and the workforce by allowing working parents the flexibility to care for their children in important formative years without needing to resign from their paid jobs.

Under the Fair Work Act an employee has the right to request an additional 12 months' unpaid parental leave after an initial 12 months' unpaid leave. The employer can only refuse such a request on reasonable business grounds and must provide written reasons for their decision if the request is refused. However, there is no statutory requirement for a request to be discussed with the employer.

Refusing a request to extend unpaid parental leave without due consideration and discussion about the reasons for the refusal can lead to disgruntled employees, and employees may make the decision to resign rather than return to work. A meeting may enable an employer to clearly explain the business reasons of their decision to the employee.

### **7.2 Objective**

The objective of this amendment is to promote meaningful discussion and ensure due consideration of requests for extensions of unpaid parental leave before an employer makes a final decision about such requests. Employers will continue to be able to refuse such requests on reasonable business grounds.

### **7.3 Options**

#### *7.3.1 Option One – Maintain the status quo*

If the status quo is maintained, employers will be able to continue to refuse an employee's request for extended unpaid parental leave on reasonable business grounds without meeting with the employee to discuss their request. The provisions require a refusal of a request to be made by the employer in writing not more than 21 days after the request is made.

#### *7.3.2 Option Two – Require a meeting to be held before a request to extend unpaid parental leave can be refused*

This option involves implementing the Government's election commitment to require that a meeting take place between the employer and the employee to discuss a request for an extension of unpaid parental leave unless the employer has already agreed to the request. This option was recommended by the Review Panel in recognition of the experience of some stakeholders with employers refusing such requests without due consideration (page 94 and page 99).

Recommendation 3 reads:

*The Panel recommends that s. 76 be amended to require the employer and the employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has agreed to the request (page 94).*

It is likely that a meeting would already form part of considering a request to extend unpaid parental leave despite the legislation not specifying the need for a meeting. However, the Review Panel was of the view that legislating for the requirement that a meeting be held to discuss the request would promote discussion between employees and employers and ensure due consideration of such requests in all workplaces (page 94 and page 99).

It should be noted that this option does not impose any further obligation on the employer to accept the request. This measure will provide an opportunity to discuss the employee's employment arrangements and business needs in a formal manner prior to the outcome of the request being decided. An employer will still be able to refuse a request on reasonable business grounds.

## **7.4 Impact Analysis**

### *7.4.1 Option One – Maintain the status quo*

#### Cost

Maintaining the status quo would not address the problem that some employees may be disgruntled about an employer's refusal and leave the workforce rather than return to work at a time when they are not ready to or because they feel that their employer has not duly considered their request for extended unpaid parental leave.

#### Benefit

Maintaining the status quo would avoid the cost of meeting with employees before a request is refused in circumstances where an employer would not already have a meeting to discuss such requests.

### *7.4.2 Option Two – Require a meeting to be held before a request to extend unpaid parental leave can be refused*

#### Cost

The overall size of the regulatory impact of option two would be small. Results from Fair Work Commission data indicate that formal requests for extending unpaid parental leave are rare. Around one and a half per cent of employers received a written request for an extension of unpaid parental leave beyond their 12-month entitlement under the NES since 1 January 2010 (*General Manager's report into the provisions of the National Employment Standards* [General Manager's Report into NES], page 58). Of the employers who received a single request, around 93 per cent granted the request without variation, 3.3 per cent accepted request with variation and 3.3 per cent refused the request (General Manager's Report into NES, page 66). Of employers who received multiple requests, around 92 per cent granted all of the requests without variation. Around seven per cent granted some requests without variation. Around three per cent of employers who received a single request and less than one per cent of employers who received multiple requests refused a request (General Manager's Report into NES, page 67).

#### Benefit

Option two would involve legislating that a meeting take place to discuss a request for extended unpaid parental leave before it can be refused. As clarified with stakeholders, this meeting need not be undertaken face-to-face but can also be conducted by other means e.g. over the telephone.

Requiring a meeting is likely to result in meaningful discussions between employers and employees in relation to such requests and increase the likelihood of a request being agreed to. It will also enable employers to explain their business needs/pressures to employees. This would largely benefit mothers who have been out of the workforce for a period of 12 months on paid or unpaid parental leave, who want to take an additional unpaid period of parental leave. It also benefits the mother's partner as it takes the pressure off them to commence leave in lieu of the mother being able to be the primary carer at home.

Agreement to requests for extension of unpaid parental leave may also decrease the number of employees who would resign from their job rather than having to return to work. This would have the benefit of employers being able to retain experienced longer term staff, which is likely to outweigh the cost of having a meeting. The employee would benefit by retaining their attachment to the workforce, making their transition back to work easier after a period of parental leave. The measure may therefore have a small positive impact on Australia's workforce participation rates.

If a request is not agreed to, an employee is likely to be more positive about it because of the meeting held, and its demonstration that there has been due consideration given to their request. Therefore, they may be more likely to continue working productively for the employer than if they felt their request had not been adequately considered or did not understand the reasons their employer had refused the request.

## **7.5 Regulatory cost calculation**

The regulatory effect of this proposal on businesses Australia-wide is minimal. The General Manager's Report into NES, found that around 1.5 per cent of all employers had received a written request for an extension of unpaid parental leave under the NES since the provisions came into effect on 1 January 2010 (page 58). The data shows that around 5 per cent of those requests were refused.

Therefore each year the proportion of all employers who would refuse a request and be required to hold a meeting is very low, less than 0.05 per cent. There is no evidence available to suggest that this number will change significantly over time.

The Australian Bureau of Statistics estimates that the number of employing businesses in Australia at June 2012 was around 835,000. This is the most recently available data. This number also includes not-for-profit entities that employ people however these cannot be isolated from the aggregate employing businesses figure and are therefore not separated in table 6 below.

On the basis that each year, less than 0.05 per cent of employers would be required to hold a meeting, approximately 250 employers across Australia each year would be required to hold a meeting to discuss a request to extend unpaid parental leave.

The Department considers that such a meeting would most likely be conducted by an employee at the classification of Human Resources and Recruitment - Management or equivalently paid person and would take approximately half an hour. The average weekly earnings before tax for an employee at the classification of Human Resources and Recruitment - Industrial Relations is approximately \$2140, with an hourly rate of \$56.32. The Department has used job titles and average yearly salaries before tax drawn from the MyCareer Salary Centre for the December 2013 quarter. Weekly earnings have been calculated by dividing the annual salary by 52 weeks and hourly rates of pay have been calculated by dividing the weekly amount by 38 hours.

Based on these calculations, including an automatic on-cost added in the business cost calculator, the compliance cost to businesses in Australia would be approximately \$8,166 per year.

The compliance costs and offsets discussed above have been calculated using the Business Cost Calculator over a ten year period. These are summarised in Table 7 below.

**Table 7 - Annual cost offset**

<b>Sector/Cost Categories</b>	<b>Business</b>	<b>Not-for-profit</b>	<b>Individuals</b>	<b>Total by cost category</b>
Administrative costs	\$8,166	\$0	\$0	\$8,166
Substantive compliance costs	\$0	\$0	\$0	\$0
Delay costs	\$0	\$0	\$0	\$0
Total by sector	\$8,166	0	\$0	\$8,166

## **8. Consultation**

### **8.1 Consultation with relevant stakeholders**

In May 2013 the Government released its Policy outlining proposed changes to the Fair Work laws. It was released several months prior to the election to give interested stakeholders and the community more broadly an opportunity to consider proposed reforms to the Fair Work laws. Many of the proposed changes were recommended by the Review Panel that conducted the 2012 Fair Work Act Review.

Relevant stakeholders are:

- state and territory governments
- employers and employer organisations
- employees and unions.

The recommendations of the Fair Work Act Review were also the subject of wide ranging consultation by the previous government.

### **8.2 Formal consultation processes**

There are four formal mechanisms for consulting with stakeholders on workplace relations issues.

The Select Council on Workplace Relations (SCWR) is a consultative forum for relevant state and territory ministers to discuss workplace relations, workers' compensation and work health and safety issues.

The National Workplace Relations Consultative Council (NWRCC) includes seven representatives from the Australian Council of Trade Unions and seven representatives selected from the Australian Chamber of Commerce and Industry, Australian Industry Group, National Farmers' Federation, Master Builders Australia and Business Council of Australia. These organisations are peak workplace relations bodies and, as such, are representatives of employer and employee associations more broadly.

The Committee on Industrial Legislation (CoIL) is a subcommittee of the NWRCC and meets when required to provide technical input on draft amendments prior to the introduction of workplace relations legislation.

The Senior Officials' Meeting (SOM) comprises senior state and territory officials and is a forum for the Commonwealth to consult on workplace relations, workers' compensation and work health and safety matters, as well as to consider draft legislation.

#### *8.2.1 Select Council on Workplace Relations*

The most recent Select Council on Workplace Relations (SCWR) meeting was held in Melbourne on 1 November 2013. The Chair and Minister for Employment, Senator the Hon. Eric Abetz, advised members of the range of reforms outlined in the Policy to be implemented and members were invited to provide their views and inputs on the reforms.

Members noted the Government's commitment to amend the Fair Work Act and to undertake consultation with states and territories on the detail of the amendments. Consultation on the details of the amendments went ahead at the 4 February 2014 Senior Officials Meeting discussed below.

#### *8.2.2 National Workplace Relations Consultative Council (NWRCC)*

An NWRCC meeting was held in Canberra on 25 November 2013. The Council Chair, Minister Abetz, advised the meeting of the Government's intention to implement changes to the Fair Work Act outlined in the Policy, and invited members to provide their views on the proposed changes.

Members of the NWRCC were provided a copy of the Options-stage Regulation Impact Statement for consideration and discussion at a subsequent meeting of the NWRCC held in Canberra on 31 January 2014. The Council Chair, Minister Abetz, provided specific detail on the policy and sought comment from members. Stakeholders noted the policy and discussed a number of matters related to the proposed changes to the Fair Work Act.

Members provided some feedback in relation to the assumptions in the Options-stage Regulation Impact Statement, for example, noting that estimated salary costs were low and that meetings to extend unpaid parental leave may be conducted over the phone. Member comments have been considered and reflected accordingly in this Details-stage Regulation Impact Statement.

#### *8.2.3 Committee on Industrial Legislation*

On 4 February 2014, a meeting of the Committee on Industrial Legislation was held in Canberra. Detail on the amendments was provided and the draft legislation was circulated for comment. Stakeholders noted the proposed amendments and provided feedback on the legislation, including on a number of technical and drafting matters.

Committee members acknowledged that the draft legislation generally reflects the Policy. Members provided feedback in relation to technical elements of the draft legislation, particularly in relation to the greenfields, right of entry and transfer of business provisions. Some amendments were made to the draft legislation in response to this feedback.

In public forums employer representatives have indicated broad support for the amendments proposed in the policy, although a number have proposed that more extensive changes be undertaken. Employee representatives have indicated their opposition to many of the proposals included in the policy.

#### *8.2.4 Senior Officials' Meeting*

State and territory senior officials were provided a copy of the Options-stage Regulation Impact Statement for consideration and discussion at a meeting of SOM on 4 February 2014. The Department circulated the draft legislation for comment and sought members' feedback on the Options-stage Regulation Impact Statement. Minimal feedback was provided.



**9. Checklist for assessing an options stage RIS**

Does the options-stage RIS include a minimum of three elements – the problem, objective and options?	YES
Does the options-stage RIS include at least three options (including a regulatory option, a non-regulatory or light-handed regulatory option, and a do-nothing option)?	NA – the policy is an election commitment
Has the options-stage RIS been certified at the secretary or deputy secretary level and provided to the OBPR before consideration by the decision-maker?	YES
Has the options-stage RIS been published following the public announcement of an initial decision to regulate?	YES

With regard to the options-stage RIS, the Department has fully complied.

## **10. Conclusion**

The Department recommends implementing the Government's workplace relations election commitments outlined in this document on the basis that they enable a significant reduction in red tape and compliance costs and are expected to have a positive impact on the productivity and overall economic performance of Australian industry. The reforms will improve clarity and certainty of the workplace relations system which will help businesses to grow and create new jobs while maintaining a strong and effective safety net for employees.

While some of the proposed changes have identified minor red tape and cost increases such as extending the period of unpaid parental leave by legislating a meeting must take place between an employer and employee to discuss this request; on balance these costs are far outweighed by the benefits of such proposals. Specifically:

- Setting realistic timeframes for the negotiation of greenfields agreements is expected to deliver benefits impacting positively on jobs and the Australian economy over the next 10 years.
- Refining right of entry rules is expected to reduce the disruption of excessive visits by unions for discussion purposes to workplaces delivering savings through reduced administration costs.
- Changes to the transfer of business rules for employees who voluntarily transfer between two business entities will deliver a reduction in overall costs to an employer and will deliver benefits in terms of administrative efficiencies to business as well as potentially increased mobility opportunities for employees.
- Removing restrictions to the scope of items that may be covered by Individual Flexibility Agreements will deliver benefits due to increased flexibility for employees and employers.

Red tape and compliance savings for these proposals are expected to be in the order of \$70,052,747 per year over ten years for the Australian economy.

The overall budgetary impact on the Government is nil.

## **11.Implementation and review**

The Government will introduce a Bill to implement the proposed measures in 2014. The drafting of the legislation to implement the proposed amendments to the Fair Work Act is considered to be relatively straightforward. Built into timeframes for implementation is the likelihood of a Senate inquiry into the Bill.

As part of its ongoing assessment of the workplace relations system the Government and Department will monitor the impact these legislative changes have on employers and employees to ensure they are achieving their intended purpose. The measures will also be subject to review as part of the Productivity Commission review of the workplace relations framework announced by Government and scheduled to commence in 2014.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Fair Work Amendment Bill 2014**

The Fair Work Amendment Bill 2014 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill**

The object of the *Fair Work Act 2009* (Fair Work Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

This Bill makes amendments to the Fair Work Act to respond to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* review (the Fair Work Review Report) and in relation to other matters concerning right of entry, greenfields agreements and interest on unclaimed monies. The Bill will amend the Fair Work Act by:

- amending the National Employment Standards (NES) in the Fair Work Act in relation to the extension of a period of unpaid parental leave, payment of annual leave upon termination of employment and the taking or accruing of leave while receiving workers' compensation. These amendments implement Fair Work Review Panel recommendations 2, 3 and 6;
- amending Part 2-3 and Part 2-4 of the Fair Work Act in relation to the requirements for flexibility terms in modern awards and enterprise agreements and individual flexibility arrangements made under those terms. These amendments respond to recommendations 9, 11, 12 and 24 made by the Fair Work Review Panel in the Fair Work Review Report;
- extending the good faith bargaining framework to the negotiation of single-enterprise greenfields agreements and providing that where agreement cannot be reached with a union within three months, a business will be able to apply to the Fair Work Commission (FWC) for approval of the agreement;
- providing that there will not be a transfer of business under Part 2-8 of the Fair Work Act when an employee becomes employed with an associated entity of his or her former employer after seeking that employment on his or her own initiative before the termination of the employee's employment with the old employer. These amendments respond to recommendation 38 made by the Fair Work Review Panel in the Fair Work Review Report. Similar amendments are also made in relation to Part 6-3A of the Fair Work Act;
- amending the right of entry framework of the Fair Work Act by:
  - repealing amendments made by the *Fair Work Amendment Act 2013* that required an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations;

- providing 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 (TCF) award workers;
  - repealing amendments made by the *Fair Work Amendment Act 2013* relating to the default location of interviews and discussions and reinstating pre-existing rules; and
  - expanding the FWC's capacity to deal with disputes about the frequency of visits to premises for discussion purposes.
- providing that an application for a protected action ballot order cannot be made unless bargaining has commenced. This amendment implements recommendation 31 made by the Fair Work Review Panel in the Fair Work Review Report;
  - providing 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;
  - providing for the Fair Work Ombudsman to pay interest on unclaimed monies.

### **Human rights implications**

The Bill engages the following rights:

- the right to work under Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- the right to just and favourable conditions of work under Article 7 of the ICESCR;
- the right to maternity leave under Article 10(2) of the ICESCR and Article 11(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW);
- the rights of parents and children under Articles 3, 5 and 18 of the *Convention of the Rights of the Child* (CRC) and Article 5(b) of the CEDAW;
- the right to an effective remedy under Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR);
- the right to a fair hearing under Article 14 of the ICCPR;
- the right to protection against arbitrary and unlawful interferences with privacy under Article 17 of the ICCPR; and
- the right to freedom of association in Article 22 of the ICCPR.

The definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties. However, the content of the rights to work and rights in work in the ICESCR can usefully be informed by specific obligations in treaties of the International Labour Organisation (ILO), such as the *Right to Organise and Collective Bargaining Convention 1949* (No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.

### Right to work and rights in work

Article 6(1) of the ICESCR recognises the right to work and obliges States Parties to take appropriate steps to safeguard this right. The United Nations Committee on Economic Social and Cultural Rights has stated that the right to work in Article 6(1) of the ICESCR encompasses the need to provide the worker with just and favourable conditions of work.

Article 7 of the ICESCR requires that States Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration that provides all workers with fair wages, a decent living and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

#### *Payment for annual leave*

Under the Fair Work Act, the NES and modern awards provide a safety net of minimum terms and conditions of employment. Currently, the NES provides that on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee the amount that would have been payable had the employee taken that period of leave, which includes any loading on that leave.

This amendment responds to recommendation 6 made by the Fair Work Review Panel in the Fair Work Review Report. The Fair Work Review Panel stated that section 90(2) of the Fair Work Act was intended to preserve the existing arrangements for the payment of leave loading upon termination. However, the current provision has meant that the ‘longstanding arrangements under awards and enterprise agreements has been disturbed’. This has meant additional costs to employers.

The amendments in Part 2 of Schedule 1 to the Bill provide that employees are entitled to be paid an hourly rate for each hour of paid annual leave they have accrued but not taken and that hourly rate must be at least equal to the employee’s base rate of pay. This means that employees will receive fair wages for annual leave that is accrued and untaken upon termination of employment. The amendments also make it clear that modern awards and enterprise agreements may provide for more beneficial terms than those provided for under the NES. The amendments will have the effect of restoring the historical provision and providing certainty for employers.

These amendments are consistent with recognising the right to just and favourable conditions of work, because the NES continues to ensure that employees receive remuneration that provides for fair wages and a decent living, consistent with Article 7 of the ICESCR.

#### *Taking or accruing leave while receiving workers’ compensation*

The Fair Work Act currently provides that an employee is not entitled to take or accrue any leave or absence under the NES during a period in which an employee is absent from work because of a personal illness or injury for which the employee is receiving compensation under a Commonwealth, State or Territory compensation law. However, subsection 130(2) provides that an employee may take or accrue leave during a compensation period if taking or accruing leave is permitted by a Commonwealth, State or Territory compensation law.

The amendment in Part 3 of Schedule 1 to the Bill provides that an employee cannot take or accrue any type of leave while he or she is absent from work and is receiving workers’ compensation. This amendment responds to recommendation 2 made by the Fair Work Review

Panel in the Fair Work Review Report. Currently, confusion exists as to what arrangements apply in each jurisdiction as to whether leave may be accrued or taken while an employee is absent from work and in receipt of workers' compensation. In those jurisdictions where it is possible to accrue leave (Queensland and the Commonwealth) employers incur an additional cost relative to other jurisdictions. It appeared anomalous to the majority of the Fair Work Review Panel that employees in two jurisdictions may accrue annual leave while on workers' compensation but not under other jurisdictions.

This amendment engages but does not limit human rights because the NES continues to ensure that employees receive remuneration that provides for fair wages and a decent living, consistent with Article 7 of the ICESCR. Rather, the amendment ensures that all employees in the national system have the same entitlements in relation to the taking or accrual of leave during a period in which the employee is in receipt of workers' compensation.

#### *Individual flexibility arrangements*

The Fair Work Act requires all modern awards and enterprise agreements to contain a flexibility term that enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of certain terms of the applicable modern award or enterprise agreement in relation to that employee and the employer in order to meet their genuine needs.

If an employee and employer agree to an individual flexibility arrangement under the flexibility term in the relevant modern award or enterprise agreement, the instrument has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement and the arrangement is taken to be a term of the instrument.

Part 4 of Schedule 1 to the Bill ensures that workers have access to flexibility by requiring that enterprise agreement flexibility terms must provide, as a minimum, that individual flexibility arrangements may be made that vary the effect of terms of the enterprise agreement about arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading. Bargaining representatives for an enterprise agreement may continue to agree to include any other matters within the scope of their enterprise agreement flexibility term.

Modern award flexibility terms already provide that individual flexibility arrangements may be made about these five matters.

Part 4 of Schedule 1 to the Bill will also extend the notice period for unilateral termination of an individual flexibility arrangement to 13 weeks, giving employers and employees greater certainty about working arrangements.

The amendments in respect of individual flexibility arrangements promote the right to just and favourable conditions of work as they will facilitate greater access for employees to flexibility regarding their working arrangements whilst continuing to ensure that they remain better off overall under the individual flexibility arrangement than without it. These amendments respond to recommendations 9, 12 and 24 made by the Fair Work Review Panel in the Fair Work Review Report.

Items 10 and 18 respond to a Fair Work Review Panel recommendation that the Fair Work Act be amended so that an employer has a statutory defence to any claim for underpayment and penalties made after entering into an individual flexibility arrangement (recommendation 11).

These amendments provide an employer with a defence to an alleged contravention of a flexibility term provided that the employer's belief that it had complied with the requirements of the flexibility term, based on the facts and circumstances in existence at the time of making the individual flexibility arrangement, was reasonable. In these circumstances an employer will not breach the civil remedy provision in section 45 or section 50, as relevant.

New subsection 203(4A) requires a flexibility term in an enterprise agreement to require the employer to ensure that any individual flexibility arrangement made under it includes a statement by the employee setting out why he or she believes, at the time of agreeing to the arrangement, that it meets his or her genuine needs and results in him or her being better off overall. This promotes the right to just and favourable conditions of work by providing greater transparency about the existing safeguards.

### *Transfer of business*

Currently, under Part 2-8 of the Fair Work Act, when an employee transfers between associated entities, the industrial instrument covering the old employer and the employee automatically transfers with the employee to the new employer even if the transfer occurs at the initiative of the employee. The only way to prevent the old employer's instrument applying to the new employment is to secure an order to that effect from the FWC.

The Fair Work Review Panel noted that it would be 'preferable to spare both parties the time and expense of making such an application' in these circumstances (page 206). Consequently, the Fair Work Review Panel recommended that the Fair Work Act should make it clear that in these circumstances, the employee's employment should be subject to the terms and conditions provided by the new employer (recommendation 38). These amendments respond to recommendation 38.

The amendments to Part 2-8 engage the right to just and favourable conditions at work. The amendments may result in reductions to employee entitlements where the new employer's industrial instrument has terms and conditions that are less favourable than the old employer's instrument or a transferring employee has entitlements that carry over and are later paid out by the new employer at a lower rate. On the other hand, where the new employer's industrial instrument has terms and conditions that are more favourable than the old employer's instrument or the transferring employee's salary increases the amendments will result in an increase to employee entitlements.

Any concerns regarding possible reductions may be balanced against the overriding criteria that the employment with the new employer must have been sought by the employee on his or her own initiative, before the termination of the employee's employment with the old employer. An employee who is seeking to gain particular employment can be expected to assess the advantages and disadvantages of doing so before he or she transfers to the new employer. Further, any change in an employee's conditions will remain underpinned by the legislative safety net and an employee's continuity of service will not be affected.

The amendments will not operate in circumstances where the employee's movement to another employer is in response to a direction by the old employer. Nor would they operate if the movement comes about as a result of the old employer taking or threatening to take action against the employee. The General Protections in Part 3-1 of Chapter 3 of the Fair Work Act may also apply in that circumstance.



The Fair Work Review Panel also noted that an amendment pursuant to its recommendation 38 ‘is unlikely to increase the risks of employees having their terms and conditions of employment diminished through transfers to associated entities’ (page 206).

The above considerations also apply to the amendments to Part 6-3A.

*Dismissing unfair dismissal applications*

The unfair dismissal provisions of the Fair Work Act safeguard the right to work, including security against unfair dismissal. The unfair dismissal amendments will assist in the efficient resolution of claims by encouraging all parties to participate in proceedings in a reasonable manner. The amendments set out that an unfair dismissal claim can be dismissed without the FWC holding a hearing or conducting a conference where:

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

The amendments strike the appropriate balance between the need to protect workers from unfair dismissal and to provide a deterrent against unreasonable conduct during proceedings.

The unfair dismissal amendments are reasonable and proportionate to address the time and expense caused to the parties to an unfair dismissal matter of a requirement for a hearing or conference where an unfair dismissal application has not been prosecuted or the application has not been made in accordance with the Fair Work Act, is frivolous or vexatious or has no reasonable prospects of success.

The power provided to dismiss certain unfair dismissal applications without a hearing or conference is discretionary and subject to certain safeguards, including that the parties must be invited to provide further information to the FWC that relates to whether the power should be exercised and that the FWC must take account of any such information. Existing appeal rights to a Full Bench of the FWC against decisions of the FWC are not disturbed by the unfair dismissal amendments.

These amendments respond to Fair Work Review Panel recommendation 43. The Fair Work Review Panel was of the view that the requirement in section 397 of the Fair Work Act, for the FWC to conduct a conference or hold a hearing if a matter involves disputed facts, was a significant contributing factor in the reluctance of the FWC to dismiss unmeritorious, vexatious or frivolous applications without a conference or hearing. The Fair Work Review Panel recommended that the Fair Work Act be amended to provide the FWC with the discretionary power to dismiss unfair dismissal applications without a conference or hearing in circumstances where the application is frivolous or vexatious or has no reasonable prospects of success, a settlement agreement has been concluded or an applicant fails to attend a proceeding or comply with an FWC direction or order. As a safeguard, the Fair Work Review Panel recommended that the FWC be required to invite the parties to provide further information for the FWC to consider before making a decision to dismiss an application or not.

The unfair dismissal amendments will not prevent genuine claims from being pursued. Instead, they will discourage unreasonable conduct and are appropriate and proportionate to address the time and expense that such conduct may cause another party to incur.

#### *Unclaimed money*

The amendment to section 559 promotes the right to fair wages. Currently, the Fair Work Act promotes the right to fair wages by providing that if an employee has left employment and cannot be located, the employer can pay monies owing to that employee to the Commonwealth, which holds the money until the employee can be paid. The amendment extends the Fair Work Act's protections regarding a former employee's outstanding entitlements so that in appropriate circumstances the real value of that money is maintained over time.

#### Right to maternity leave

Article 10(2) of the ICESCR states that special protection should be accorded to mothers during a reasonable period before and after childbirth, with working mothers accorded paid leave or leave with adequate social security benefits during such a period.

Article 11(2) of the CEDAW requires that States Parties take appropriate measures to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

Article 18(1) of the CRC states that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

#### *Extension of period of unpaid parental leave*

The Fair Work Act provides that an eligible employee is entitled to at least 12 months of unpaid parental leave. In general, to be eligible for unpaid parental leave an employee must have completed at least 12 months of continuous service before the expected date of birth of the child. An employee who is currently on a period of unpaid parental leave may request an additional period of unpaid parental leave. The maximum period of additional leave that may be sought is 12 months.

Part 1 of Schedule 1 to the Bill amends the Fair Work Act to provide that an employer must not refuse an employee's request for an extension of unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request. This amendment promotes the obligations set out in Article 10(2) of the ICESCR, Article 11(2) of the CEDAW, and Article 18 of the CRC by ensuring mothers have a reasonable opportunity to discuss a request for extension of unpaid parental leave with their employer if the employer is considering refusing the request. This amendment encourages recognition of the principle that both parents have common responsibilities for the upbringing and development of the child, because either parent may request an extension for unpaid parental leave.

This amendment responds to recommendation 3 made by the Fair Work Review Panel in the Fair Work Review Report.

### Rights of parents and children

Article 3 of the CRC provides that, in all actions undertaken by legislative bodies amongst others, the best interests of the child shall be a primary consideration, while Article 18 of the CRC states that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

Article 5(b) of the CEDAW provides that States Parties should take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

### *Extension of period of unpaid parental leave*

The amendment made by Part 1 of Schedule 1 to the Bill engages the obligations set out in Article 3 of the CRC and Article 5(b) of the CEDAW by ensuring that an employee has a reasonable opportunity to discuss with their employer their family and caring responsibilities when their employer is considering refusing a request for an extension of unpaid parental leave. The amendment promotes the obligations set out in the CRC and the CEDAW because the amendment ensures that the interests of the child, and an employee's family and caring responsibilities, are actively discussed in the context of a request to extend an employee's parental leave. The amendment also promotes respect for the responsibilities, rights and duties of parents and encourages the recognition of the common responsibilities of men and women in the upbringing and development of the child, because the entitlement applies to eligible employees of both genders.

As noted above, this amendment responds to recommendation 3 made by the Fair Work Review Panel in the Fair Work Review Report.

### *Individual flexibility arrangements*

The amendments in respect of individual flexibility arrangements promote the common responsibility of men and women in the upbringing and development of their children as they will facilitate greater access for employees to flexibility regarding their working arrangements.

Part 4 of Schedule 1 to the Bill facilitates greater access to flexibility by requiring that enterprise agreement flexibility terms must provide, as a minimum, that individual flexibility arrangements may be made that vary the effect of terms of the enterprise agreement about arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading. These amendments implement recommendation 24 made by the Fair Work Review Panel in the Fair Work Review Report.

Part 4 of Schedule 1 to the Bill will also extend the notice period for unilateral termination of an individual flexibility arrangement to 13 weeks, giving employers and employees greater certainty about working arrangements. These amendments implement recommendation 12 made by the Fair Work Review Panel in the Fair Work Review Report.

### Right to an effective remedy

Article 2(3) of the ICCPR provides the right to an effective remedy, including the right to have that right determined by competent judicial, administrative or legislative authorities, or any other

competent authority and matters such as the right to a presumption of innocence and the right to not be compelled to testify against himself or herself or to confess to guilt.

*Dismissing unfair dismissal applications*

The unfair dismissal amendments will not prevent genuine claims from being pursued. Instead they will discourage unreasonable conduct and are appropriate and proportionate to address the time and expense that such conduct may cause another party to incur.

Right to a fair hearing

Article 14 of the ICCPR states that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

*Dismissing unfair dismissal applications*

The FWC is an independent tribunal, which exercises its powers in a fair and just manner, including by applying the principles of procedural fairness.

In cases where the FWC determines to dismiss an unfair dismissal application without a hearing or conference, this will limit access to a competent, independent and impartial tribunal established by law.

As a safeguard, however, each party will have a reasonable opportunity to present their case. The power to dismiss an unfair dismissal application without a hearing or conference is only to be exercised in very limited circumstances where there is clear evidence for the FWC to be satisfied of the unreasonable conduct of the applicant.

As an additional safeguard, the amendments require that if the FWC decides not to hold a hearing or conduct a conference for the purpose of determining whether to exercise a designated application-dismissal power, the parties must be invited to provide further information and for this information to be taken into account. This will assist in ensuring that procedural fairness is afforded. It should further be noted that appeal rights are not impacted by these amendments.

Right to protection against arbitrary and unlawful interferences with privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The right to privacy can include the right to respect the privacy of workers in professional or business premises. For interference with privacy not to be arbitrary it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

*Right of entry*

The amendments set out at Part 8 of Schedule 1 to the Bill limit the right to workers' privacy in their employment by providing for a right of entry to workplaces. However, this limitation is necessary, reasonable and proportionate, and promotes the right to safe and healthy working conditions, set out at Article 7(b) of the ICESCR by providing for unions to enter workplaces to hold discussions and represent the interests of their members.

### Right to Freedom of Association

The right to freedom of association is enshrined in Article 22 of the ICCPR. Article 8(1) of the ICESCR supports this by providing that States Parties to that Covenant undertake to ensure the right of everyone to form trade unions and join the trade union of his or her choice, and not place restriction on the exercise of this right. Article 8 also provides that the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society for, inter alia, the rights and freedoms of others. Finally, Article 8 protects the right to strike, provided it is exercised in conformity with the laws of the particular country.

Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1) of the ICESCR protects:

- the right to form and join trade unions;
- the right of trade unions to function freely subject to necessary limitations in the interests of national security, public order or the protection of the rights and freedoms of others; and
- the right to strike, provided it is exercised in conformity with the laws of the particular country.

### *Protected action ballot orders*

The right of employees to take protected industrial action to support or advance claims for an enterprise agreement is provided for under the Fair Work Act, with its emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations, clear rules governing industrial action (paragraph 3(f)) and the establishment of a fair, simple and democratic process to determine whether employees wish to engage in protected industrial action (section 436).

Under the Fair Work Act, employees can take protected industrial action to support or advance claims for an enterprise agreement and are immune from civil liability in relation to such action (unless the action involves personal injury or damage or the destruction or taking of property).

The Fair Work Act permits employers and employees to engage in protected industrial action in support of claims for an enterprise agreement provided that certain requirements are satisfied. One of these requirements is that protected industrial action must be authorised by a protected action ballot of employees.

Item 56 of Schedule 1 to the Bill inserts a new requirement that before an application for a protected action ballot order is made, there must have been a ‘notification time’ in relation to the proposed enterprise agreement. The ‘notification time’ is an established concept in the agreement-making framework in Part 2-4 of the Fair Work Act which relates to the time at which employees are notified of their right to be represented by a bargaining representative in enterprise bargaining negotiations.

This amendment is a direct response to and implements a recommendation by the Fair Work Review Panel that the Fair Work Act be amended so that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced,

either voluntarily or because a majority support determination has been obtained (recommendation 31). In making its recommendation, the Fair Work Review Panel considered the Full Federal Court decision in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53 and found that while the law was now settled, it did not reflect an ‘appropriate outcome from a policy perspective’ (page 177) as the legislature has sought to codify the circumstances in which an employer can be positively required to bargain. On that basis, the Fair Work Review Panel considered it ‘incongruous for industrial action to be available to bring pressure to bear on an employer to bargain outside of those circumstances’ (page 177).

Whilst the amendment will limit the right to strike until bargaining has commenced between the employer, employees and relevant employee organisation(s) it is considered reasonable, necessary and proportionate to achieving the legitimate objectives of:

- promoting the integrity of the collective bargaining framework, including by giving primacy to negotiations voluntarily entered into and conducted in good faith;
- balancing the right to voluntary collective bargaining with the requirement to bargain where a majority of employees wish to do so; and
- providing greater certainty as to the circumstances in which protected industrial action can be taken.

#### *Right of entry*

The amendments made by Part 8 of Schedule 1 to the Bill engage the right to freedom of association and the rights of people to form organisations to represent their interests. Of particular relevance in the right of entry context is guidance provided by the Committee on Freedom of Association established by the Governing Body of the International Labour Organisation in its 336th Report at paragraph 108 that:

*... Governments should guarantee access of trade union representatives to workplaces with due respect for the rights of property and management, so that trade unions can communicate with workers...*

Part 3-4 of the Fair Work Act provides a framework for right of entry for officials of organisations and empowers the FWC to deal with the misuse of rights and disputes.

The object of Part 3-4 is to establish a framework for right of entry that balances:

- the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions;
- the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and
- the right of occupiers of premises and employers to go about their business without undue inconvenience.

The amendments made by Part 8 of Schedule 1 to the Bill provide for the circumstances in which a permit holder is entitled to exercise a right of entry to hold discussions or conduct interviews with employees. The organisation must be covered by an enterprise agreement that applies to work performed at the premises, or, in circumstances where the organisation is not covered by an

enterprise agreement it must have been invited to send a representative to the premises by an eligible person.

These amendments place limits on the classes of persons who may exercise entry for discussion purposes, and in what circumstances. To the extent that these provisions limit the right to freedom of association, the limitation is necessary, reasonable and proportionate, because the amendments ensure that entry for discussion purposes can only be exercised if there are employees or TCF award workers on the premises who wish to participate in discussions, and the organisation has a legitimate role at the work site. The amendments ensure that the role of trade unions in Australian workplaces is enshrined appropriately in the right of entry framework, and balances the needs of employers, occupiers and employees in a manner that is consistent with the object of Part 3-4.

The Bill also repeals amendments made by the *Fair Work Amendment Act 2013* that provided for interviews and discussions to be held in rooms or areas agreed by the occupier and permit holder, or in the absence of agreement, in a meal or break room; and that facilitated assistance with transport and accommodation for permit holders at remote sites. The repeal of these amendments does not limit the right to freedom of association. Rather, the amendments set out in the Bill merely relate to procedural matters of how a trade union may go about exercising its entry rights under the Fair Work Act, and the extent to which an occupier is required to facilitate the entry. They do not prevent or otherwise limit the exercise of existing entry rights.

The amendments also broaden the capacity of the FWC to deal with disputes about the frequency of entry to premises for discussion purposes. In dealing with right of entry disputes, FWC must take into account fairness between the parties concerned, and the combined impact of visits by permit holder's on the operations of the employer or occupier. These amendments ensure appropriate conduct by permit holders while exercising right of entry for discussion purposes, consistent with the right of entry framework established by the Fair Work Act, and provide for an avenue for the prompt resolution of disputes by an independent arbiter.

The amendments in Part 8 of Schedule 1 to the Bill provide for right of entry disputes to be resolved with due respect for both the rights of employees to be represented at work and the rights of the occupiers of premises to maintain their property and manage their businesses. To the extent that the amendments limit the right to freedom of association, the limitations are necessary, reasonable and proportionate.

### Collective bargaining

Article 4 of the ILO Right to *Organise and Collective Bargaining Convention 1949 (No. 98)* protects the right of employees to collectively bargain for terms and conditions of employment. It requires States Parties to (among other things) take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Fair Work Act provides a framework with an emphasis on collective bargaining in good faith. Where an employer does not voluntarily agree to bargain in circumstances where a majority of relevant employees want to bargain, the FWC can require bargaining to commence by making a majority support determination (section 237).

### *Individual flexibility arrangements*

These amendments engage, but do not limit, Article 4 of the ILO *Right to Organise and Collective Bargaining Convention 1949 (No. 98)*, which places primacy on the regulation of terms and conditions of employment by means of collective agreements. The amendments both ensure that employees retain the benefit of their collectively negotiated enterprise agreement and also facilitate greater access for employees to flexibility regarding their working arrangements, should that meet the parties' genuine needs and result in the employee being better off overall with the individual flexibility arrangement than without it.

The Fair Work Act requires all enterprise agreements to contain a flexibility term that enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of certain terms of the agreement in relation to that employee and the employer in order to meet their genuine needs, provided that the arrangement leaves the employee better off overall than he or she would be without the arrangement.

The amendments made by Part 4 of Schedule 1 to the Bill require all enterprise agreements to provide, as a minimum, that individual flexibility arrangements may be made that vary the effect of terms of the enterprise agreement about arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading. These minimum matters reflect those included in the usual flexibility term for modern awards and the model flexibility term for enterprise agreements in the *Fair Work Regulations 2009*. Bargaining representatives for an enterprise agreement may continue to agree to include any other matters within the scope of their enterprise agreement flexibility term.

The amendments also insert a new requirement that an individual flexibility arrangement include a statement about why the employee believes the arrangement meets his or her genuine needs and leaves him or her better off overall.

These amendments respond to recommendations 9, 12 and 24 made by the Fair Work Review Panel in the Fair Work Review Report.

### *Extension of enterprise bargaining rights, obligations and assistance to greenfields agreements*

Part 2-4 of the Fair Work Act provides a legislative framework for the making of enterprise agreements through a process of collective bargaining in good faith. Enterprise agreements are made between employers and employees, except for greenfields agreements, which are made between employers and unions before any employees who will be necessary for the normal conduct of that enterprise and will be covered by the agreement are employed. However, unlike other forms of agreement making under the Fair Work Act, employers and unions that negotiate greenfields agreements are not recognised as 'bargaining representatives'. This means that there is no requirement to comply with the good faith bargaining framework.

The Fair Work Review Panel identified that under the existing greenfields agreement making framework in the Fair Work Act 'there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia' (page 171). The Fair Work Review Panel observed that under the current framework, a union (or unions) that are able to represent the industrial interests of the majority of employees to be employed in a greenfields project are effectively capable of frustrating the making of a greenfields agreement in a timely way. Evidence and submissions provided by



business and industry indicated that these risks undermined the need for certainty over labour costs and may delay the commencement of major new projects.

The amendments made by Part 5 of Schedule 1 to the Bill engage with Article 4 of the *ILO Right to Organise and Collective Bargaining Convention 1949 (No. 98)* by extending the good faith bargaining framework to the negotiation of all single-enterprise greenfields agreements. This will enhance collective bargaining in relation to these types of agreements by promoting good faith bargaining and providing access to bargaining assistance from the FWC in relation to these agreements.

Part 5 of Schedule 1 to the Bill also engages with Article 4 of the *ILO Right to Organise and Collective Bargaining Convention 1949 (No. 98)* by providing an optional three month negotiation timeframe for employers and employee organisations to reach agreement. Where agreement cannot be reached, an employer will be able to apply to the FWC for approval of its agreement. The agreement will be required to satisfy the existing approval tests under the Fair Work Act and an additional new requirement that the agreement provides for pay and conditions that are consistent with the prevailing standards and conditions within that industry for equivalent work. To ensure that employees that will be employed under the agreement have access to representation when they commence employment, the FWC must ensure that the agreement covers each employee organisation that was a bargaining representative for the agreement. Therefore, to the extent that these amendments limit rights, they are reasonable, necessary and proportionate to achieving the legitimate objectives of addressing and improving bargaining conduct for greenfields agreements and ensuring the timely negotiation of these agreements, so as to not delay the commencement of new projects.

## **Conclusion**

The amendments are compatible with human rights because they advance the protection of human rights. To the extent that the amendments may limit human rights, those limitations are reasonable, necessary and proportionate.

**Minister for Employment, Senator the Hon. Eric Abetz**

## **NOTES ON CLAUSES**

In these notes on clauses, the following abbreviations are used:

Fair Work Act	<i>Fair Work Act 2009</i>
Fair Work Regulations	<i>Fair Work Regulations 2009</i>
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
NES	National Employment Standards
the Bill	Fair Work Amendment Bill 2014
the Fair Work Review Panel	The panel appointed to review the <i>Fair Work Act 2009</i> and the <i>Workplace Relations Amendments (Transition to Forward with Fairness) Act 2008</i>
the Fair Work Review Report	<i>Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation</i>

### **Clause 1 – Short title**

1. This is a formal provision specifying the short title.

### **Clause 2 – Commencement**

2. The table in this clause sets out when the provisions of the Bill commence.

### **Clause 3 – Schedule(s)**

3. Clause 3 of the Bill provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

## **SCHEDULE 1 – AMENDMENTS**

### **Part 1 – Extension of period of unpaid parental leave**

#### **Overview**

4. Part 1 of Schedule 1 to the Bill amends section 76 of the Fair Work Act to provide that an employer must not refuse a request for extended unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request. The amendment in this Part implements Fair Work Review Panel recommendation 3.

#### ***Fair Work Act 2009***

##### **Item 1 – After subsection 76(5)**

5. Subsection 76(1) provides that an employee who takes unpaid parental leave for his or her available parental leave period may request an additional period of unpaid parental leave. The maximum period of additional leave that may be sought is 12 months.

6. Subsections 76(2) to (5) set out the process for making a request and the manner in which an employer is required to deal with a request for an extension of unpaid parental leave.

7. Item 1 inserts new subsection 76(5A) to provide that an employer must not refuse a request that has been made under subsection 76(1) unless the employer has given the employee a reasonable opportunity to discuss the request. The obligation does not arise if the employer has agreed to the request.

8. What constitutes a reasonable opportunity to discuss the request is not defined, however, it is intended that a discussion by telephone or other electronic means such as digital video conferencing will satisfy the requirements of new subsection 76(5A). Conversely, it is not intended that communication by text-based means such as email or short message service (SMS) will satisfy the requirements of new subsection 76(5A).

9. New subsection 76(5A) is intended to provide flexibility for employers and employees in relation to the manner in which a request for extended unpaid parental leave is discussed. The effect of this is that employers and employees will be able to utilise available technologies to facilitate a discussion if a face to face meeting is not possible or convenient.

### **Part 2 – Payment for annual leave**

#### **Overview**

10. Part 2 of Schedule 1 to the Bill amends section 90 of the Fair Work Act to provide that on termination of employment, untaken annual leave is paid out at the employee's base rate of pay. The amendments in this Part implement Fair Work Review Panel recommendation 6.

***Fair Work Act 2009***

**Item 2 – Subsection 55(4) (paragraph (b) of note 2)**

**Item 3 – Subsection 55(4) (at the end of note 2)**

**Item 4 – Subsection 90(2)**

11. Item 4 repeals and substitutes new subsection 90(2). New subsection 90(2) provides that if an employee has a period of untaken paid annual leave at the time when the employment of the employee ends:

- the employer must pay the employee an hourly rate for each hour of paid annual leave that the employee has accrued and not taken; and
- that hourly rate must not be less than the employee's base rate of pay that is payable immediately before the termination time.

12. 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.

13. Items 2 and 3 insert amendments consequential upon the amendment made by item 4.

14. A legislative note to new subsection 90(2) refers the reader to the interaction rules at section 55 of the Fair Work Act. Section 55 sets out the relationship between the NES and modern awards and enterprise agreements.

15. Subsection 55(4) provides that a modern award or enterprise agreement can include:

- terms that are ancillary or incidental to the operation of NES entitlements; and
- terms that supplement NES entitlements;

provided that the effect of those terms is not detrimental to an employee in any respect compared to the NES. The effect of this is that modern awards and enterprise agreements are permitted to provide more beneficial terms than the minimum standards provided by the NES.

16. Legislative note 2 to subsection 55(4) provides examples of supplementary terms that are permitted by paragraph 55(4)(b). Item 3 inserts an example into legislative note 2 at the end of subsection 55(4). The example makes clear that a modern award or enterprise agreement is permitted to include supplementary terms that provide that, when the employment of an employee ends, the employee is to be paid the amount that would have been payable to the employee had the employee taken that period of leave. This amount could include annual leave loading, which is not otherwise payable under new subsection 90(2).

17. Item 2 is consequential to the amendment made in item 3.

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

### **Overview**

18. Part 3 of Schedule 1 to the Bill repeals subsection 130(2) of the Fair Work Act. The effect of this is 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. The amendment in this Part implements Fair Work Review Panel recommendation 2.

### ***Fair Work Act 2009***

#### **Item 5 – Subsection 130(2)**

19. Subsection 130(1) provides that an employee is not entitled to take or accrue any leave or absence, whether paid or unpaid, under Part 2-2 of the Fair Work Act during a period in which the employee is absent from work because of a personal illness or injury for which the employee is receiving compensation payable under a Commonwealth, State or Territory workers’ compensation law.

20. Item 5 repeals subsection 130(2) of the Fair Work Act. The effect of this amendment is that national system employees will not be entitled to take or accrue annual or any other type of leave under Part 2-2 of the Fair Work Act while he or she is absent from work and in receipt of workers’ compensation. The amendment ensures that national system employees will have the same entitlements in relation to the accrual and taking of leave under Part 2-2 of the Fair Work Act while absent from work and in receipt of workers’ compensation, regardless of the particular compensation law that applies to them.

## **Part 4 – Individual flexibility arrangements**

### **Overview**

21. Under the Fair Work Act, every modern award and enterprise agreement must contain a flexibility term that allows an employer and an individual employee to make an individual flexibility arrangement that varies the effect of certain terms of the modern award or agreement, as between them, to meet their genuine needs.

22. An individual flexibility arrangement must, amongst other things:

- set out the terms of the modern award or enterprise agreement that are to be varied in their effect;
- be genuinely agreed to by the employer and the employee;
- result in the employee being better off overall than if no individual flexibility arrangement were in place; and
- be signed by both the employer and employee (and a parent or guardian of the employee in the case where the employee is under 18 years of age).

23. The usual flexibility term in modern awards was initially developed by the Australian Industrial Relations Commission during the award modernisation process. It enables an

individual flexibility arrangement to vary the effect of terms about arrangements for when work is performed, overtime and penalty rates, allowances and leave loadings.

24. The scope of an enterprise agreement flexibility term is a matter for bargaining. An enterprise agreement flexibility term enables an individual flexibility arrangement to vary terms of the enterprise agreement in relation to a particular employee, provided the employee is better off overall. An individual flexibility arrangement cannot exclude the NES.

25. If an enterprise agreement does not include a flexibility term, or if it does not contain a flexibility term that complies with the requirements of the Fair Work Act, the model flexibility term (prescribed by the Fair Work Regulations) is taken to be a term of the agreement. As with the usual flexibility term in modern awards, it enables an individual flexibility arrangement to vary the effect of terms about arrangements for when work is performed, overtime and penalty rates, allowances and leave loadings.

26. While in operation an individual flexibility arrangement is enforceable as a term of the modern award or enterprise agreement under which it is made.

27. The amendments in this Part respond to recommendations 9, 11, 12 and 24 made by the Fair Work Review Panel in the Fair Work Review Report and it is intended that this will provide clarity and certainty for employers and employees, whilst maintaining the protections in the Act that individual flexibility arrangements (whether made under a modern award or an enterprise agreement) cannot exclude the National Employment Standards and each must result in the employee being better off overall than they would have been if no individual flexibility arrangement had been entered into.

### **Division 1 – Modern awards (genuine needs statements)**

#### ***Fair Work Act 2009***

#### **Item 6 – After paragraph 144(4)(c)**

28. This item inserts new paragraph 144(4)(ca) which requires a flexibility term in a modern award to require the employer to ensure that any individual flexibility arrangement made under it includes a statement by the employee setting out why he or she believes, at the time of agreeing to the arrangement, that it meets his or her genuine needs and results in him or her being better off overall.

29. Requiring these matters to be put into writing ensures that both the employer and employee consider these requirements before agreeing to an individual flexibility arrangement. This statement could be used as evidence of the employee's state of mind at the time that the individual flexibility arrangement was agreed to and may be relevant to assessing the reasonableness of the employer's belief that it had complied with those requirements for the purposes of new section 145AA (inserted by item 10). The genuine needs statement is intended to provide additional safeguards for both employers and employees.

## **Division 2 – Modern awards (other matters)**

### ***Fair Work Act 2009***

#### **Item 7 – Paragraph 144(4)(d)**

30. This item repeals and substitutes paragraph 144(4)(d) concerning the requirement that modern award flexibility terms set out how individual flexibility arrangements made under the term may be terminated by the employer and employee. Previously the provision did not specify the minimum unilateral notice period or that the arrangement could be terminated at any time by the employer and employee by agreement in writing.

31. New paragraph 144(4)(d) provides that a flexibility term in a modern award must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated by either the employer or employee giving written notice of 13 weeks (subparagraph 144(4)(d)(i)). Where both the employer and employee agree in writing to the termination of the individual flexibility arrangement, there is no requirement that 13 weeks' notice must be given and the arrangement can be terminated at any time (subparagraph 144(4)(d)(ii)).

32. This amendment is consistent with the decision of a Full Bench of the FWC in *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 (15 April 2013) to extend the notice period for unilateral termination of an individual flexibility arrangement from four weeks to 13 weeks. The usual flexibility terms in modern awards were varied to give effect to this determination on 4 December 2013.

33. Formalising the minimum notice period for unilateral termination of an individual flexibility term as a statutory requirement addresses the current inconsistency of approach in the framework between the requirements for modern award and enterprise agreement flexibility terms. It ensures that the period of notice required for unilateral termination of individual flexibility arrangements made under modern awards and enterprise agreements will remain consistent in the future.

34. This amendment responds to the Fair Work Review Panel's recommendation that paragraph 144(4)(d) and subsection 203(6) be amended to require a flexibility term to require employers to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee (recommendation 12).

#### **Item 8 – At the end of subsection 144(4)**

35. To assist readers, this item inserts a legislative note to subsection 144(4) that confirms that the requirement that an individual flexibility arrangement leave an employee better off overall (see paragraph 144(4)(c)) can be satisfied by the provision of benefits that are not monetary. This does not change the protections that apply in respect of individual flexibility arrangements. Rather, the legislative note is intended to provide clarity and certainty to employers and employees.

36. It is expected that the subjective preferences of the employee would be relevant in assessing the relative value of benefits.

**Illustrative example**

Elizabeth is employed full time in the accounts section at Oze Airlines Pty Ltd. The *Airline Operations Ground Staff Award 2010* applies to Elizabeth's employment. This modern award enables an individual flexibility arrangement to be made between an employer and its employees in relation to arrangements for when work is performed.

Elizabeth has school aged children that she wishes to pick up from school two days per week. She negotiates an individual flexibility arrangement with her employer that she will work longer hours three days per week, so that she can leave at 3pm on the other two days to pick up her children. Elizabeth will still work the equivalent of full time hours.

37. Individual flexibility arrangements are intended to facilitate arrangements that meet the parties' genuine needs. Therefore, in considering whether an individual flexibility arrangement leaves an employee better off overall, the employee's views and preferences will be relevant, as will those of the employer.

**Illustrative example**

Jordan is a clerical employee at Community University. Under the *Higher Education Industry – General Staff – Award 2010* the ordinary hours of work for PACCT staff are 36.75 hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Jordan's employer usually requires clerical employees to work from 9am to 5.30pm.

In his spare time, Jordan coaches an under-12s basketball team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the modern award. The modern award allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the modern award dealing with arrangements for when work is performed and penalty rates.

Jordan approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Jordan can work from 7.30am to 4pm on Tuesdays and Thursdays. Jordan agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Jordan is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Jordan is better off overall under the individual flexibility arrangement than under the modern award. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the modern award, and the modern award as varied by the individual flexibility arrangement. In Jordan's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Jordan's case that



suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Jordan initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the basketball team;
- Jordan genuinely agreed to the arrangement;
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 36.75 hour ordinary week that Jordan works.

38. This amendment responds to the Fair Work Review Panel's recommendation that the better off overall requirement in paragraph 144(4)(c) and subsection 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 (see recommendation 9).

39. As the Fair Work Act already permits benefits that are not monetary to be taken into account when determining whether an employee is better off overall under an individual flexibility arrangement and to avoid casting doubt on this by altering the current provisions, recommendation 9 has been implemented by way of legislative note rather than substantive provision.

40. The Fair Work Act currently provides that a flexibility term must require that an individual flexibility arrangement must, relevantly, be genuinely agreed to by the employer and the employee and result in the employee being better off overall than if no individual flexibility arrangement were in place. This will remain the case under the Bill. It is intended that the new requirement that a genuine needs statement be included in an individual flexibility arrangement (new paragraph 144(4)(ca) inserted by item 6) would provide a written record to assist in any assessment of the requirements.

41. These amendments are intended to provide clarity and certainty about the operation of the Fair Work Act and are consistent with the original intention of the Fair Work Act as explained at paragraphs 860-868 of the Explanatory Memorandum to the Fair Work Bill 2008.

#### **Item 9 – At the end of subsection 145(3)**

42. This item inserts a legislative note to subsection 145(3) which explains that an employer does not contravene a flexibility term in the circumstances set out in new section 145AA (inserted by item 10). The legislative note is intended to explain the interaction between these provisions for the avoidance of doubt.

#### **Item 10 – After section 145**

43. If an individual flexibility arrangement does not satisfy a requirement in section 144, as reflected in the relevant modern award flexibility term, the arrangement continues to have effect as if it were an individual flexibility arrangement, but the flexibility term will have been contravened (subsection 145(3)).

44. This item inserts new section 145AA. New section 145AA provides that an employer does not contravene a flexibility term of a modern award in relation to a particular individual

flexibility arrangement if, at the time when the arrangement is made, the employer reasonably believes that the requirements of the term were complied with, so far as the requirements are applicable to the arrangement.

45. This provides an employer with a defence to an alleged contravention of a flexibility term provided that the employer's belief that they had complied with the requirements, based on the facts and circumstances in existence at the time of making the individual flexibility arrangement, was reasonable. In these circumstances an employer will not breach the civil remedy provision in section 45 and will not be exposed to liability in respect of the alleged contravention of the flexibility term.

46. The genuine needs statement required to be included in an individual flexibility arrangement by new paragraph 144(4)(ca) (inserted by item 6) would be available as evidence of the employee's state of mind at the time that the individual flexibility arrangement was agreed to and may be relevant to assessing the reasonableness of the employer's belief that it had complied with those requirements for the purposes of new section 145AA (inserted by item 10).

47. This amendment responds to the Fair Work Review Panel's recommendation that the Fair Work Act be amended to provide a defence to an alleged contravention of a flexibility term under subsection 145(3) or subsection 204(3) (see recommendation 11).

### ***Division 3 – Enterprise agreements***

#### ***Fair Work Act 2009***

#### **Item 11 – Before paragraph 203(2)(a)**

#### **Item 12 – Paragraph 203(2)(a)**

48. Item 11 inserts new paragraph 203(2)(aa), which deals with the minimum matters about which a flexibility term in an enterprise agreement must permit individual flexibility arrangements to be made.

49. New paragraph 203(2)(aa) provides that if an enterprise agreement includes terms that deal with one or more of certain listed matters, then the flexibility term in that enterprise agreement must provide that the effect of those terms may be varied by an individual flexibility arrangement agreed to under the flexibility term. Those matters are:

- arrangements about when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

50. This means that if an enterprise agreement contains terms that deal with one or more of those matters, then the flexibility term must provide, as a minimum, that individual flexibility arrangements may be made under the flexibility term that vary the effect of those

terms of the enterprise agreement. Should the enterprise agreement only contain terms dealing with some of those matters, then the flexibility term is only required to make provision in respect of those matters.

51. Item 12 amends paragraph 203(2)(a) to make it clear that employers, employees and their bargaining representatives may bargain for and agree to include additional matters about which individual flexibility arrangements can be made in the flexibility term.

52. These amendments taken together make it clear that while bargaining representatives may continue to agree to include any and all matters within the scope of their enterprise agreement flexibility term, the five matters listed in new paragraph 203(2)(aa) must be included as a minimum.

53. These five minimum matters reflect those that are included in the usual flexibility term in modern awards which was developed by the Australian Industrial Relations Commission during the award modernisation process (*Award Modernisation* [2008] AIRCFB 550). The Full Bench gave detailed reasons for its decision as to which matters should and should not be included in the scope of the usual modern award flexibility term.

54. The development of the model flexibility term for enterprise agreements in Schedule 2.2 to the Fair Work Regulations was informed by the usual flexibility term for modern awards.

55. The FWC revisited the appropriateness of the scope of the usual flexibility term in modern awards in *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 (15 April 2013). The Full Bench considered submissions from stakeholders to both expand and contract the matters about which individual flexibility arrangements may be made, but concluded that these five matters were still the most appropriate for inclusion.

56. 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). This does not change the protections that apply in respect of individual flexibility arrangements that may be made under the flexibility term of an enterprise agreement.

### **Item 13 – At the end of subsection 203(4)**

57. To assist readers, this item inserts a legislative note to subsection 203(4) that confirms that benefits that are not monetary may be taken into account for the purposes of determining whether an individual flexibility arrangement results in an employee being better off overall than the employee would have been if no individual flexibility arrangement was in place. This does not change the protections that apply in respect of individual flexibility arrangements. Rather, the legislative note is intended to provide clarity and certainty to employers and employees.

58. It is expected that the subjective preferences of the employee would be relevant in assessing the relative value of such benefits. The following examples were used in the Explanatory Memorandum to the Fair Work Bill 2008 and are relevant here.

**Illustrative example**

Danae is employed full time as a graphic designer at Pax Designs Pty Ltd. The Pax Designs Pty Ltd Enterprise Agreement 2010 enables an individual flexibility arrangement to be made between the employer and its employees in relation to the span of ordinary hours to be worked.

Danae has school aged children that she wishes to pick up from school two days per week. She negotiates an individual flexibility arrangement with her employer that she will work longer hours three days per week, so that she can leave at 3pm on the other two days to pick up her children. Danae will still work the equivalent of full time hours.

59. The better off overall requirement for individual flexibility arrangements is intended to be different to the better off overall test for enterprise agreements. The key difference is the point of comparison. When assessing the better off overall test for the purposes of approval of an enterprise agreement (which may apply to many employees uniformly), a comparison is made between the terms of the agreement and the terms of the relevant reference instrument. When assessing the better off overall requirement for an individual flexibility arrangement, a comparison is made between the individual employee's position with and without an individual flexibility arrangement.

**Illustrative example**

Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.

In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.

Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off

overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;
- Josh genuinely agreed to the arrangement;
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.

60. This amendment responds to the Fair Work Review Panel's recommendation that the better off overall requirement in paragraph 144(4)(c) and subsection 203(4) be amended to expressly permit an individual flexibility arrangement to confer non- monetary benefits on an employee in exchange for a monetary benefit.

61. As the Fair Work Act already permits benefits that are not monetary to be taken into account when determining whether an employee is better off overall under an individual flexibility arrangement, and to avoid casting doubt on this by altering the current provisions, recommendation 9 has been implemented by way of legislative note rather than substantive provision.

62. Similarly, the Fair Work Act currently provides that a flexibility term must require that an individual flexibility arrangement must, relevantly, be genuinely agreed to by the employer and the employee and result in the employee being better off overall than if no individual flexibility arrangement were in place. This will remain the case under the Bill. It is intended that the new requirement that a genuine needs statement be included in an individual flexibility arrangement (new subsection 203(4A), inserted by item 14) would provide a written record to assist in any assessment of the requirements.

#### **Item 14 – After subsection 203(4)**

63. This item inserts new subsection 203(4A) which requires a flexibility term in an enterprise agreement to require the employer to ensure that any individual flexibility arrangement made under it includes a statement by the employee setting out why he or she believes, at the time of agreeing to the arrangement, that it meets his or her genuine needs and results in him or her being better off overall.

64. Requiring these matters to be put into writing ensures that both the employer and employee consider these requirements before agreeing to an individual flexibility arrangement. This statement could be used as evidence of the employee's state of mind at the time that the individual flexibility arrangement was agreed to and may be relevant to assessing the reasonableness of the employer's belief that it had complied with those requirements for the purposes of new section 204A (inserted by item 18). The genuine needs statement will provide additional safeguards for both employers and employees.

**Item 15 – Paragraph 203(6)(a)**

65. Subsection 203(6) provides that a flexibility term in an enterprise agreement must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated by either the employer or employee giving written notice of not more than 28 days, or at any time if they agree in writing to the termination.

66. This item amends paragraph 203(6)(a) to increase the required written notice period for unilateral termination of an individual flexibility arrangement made under an enterprise agreement to 13 weeks.

67. The capacity for the parties to, at any time, agree in writing to terminate an arrangement other than by providing 13 weeks' notice remains the same.

68. This amendment responds to the Fair Work Review Panel's recommendation (recommendation 12) that paragraph 144(4)(d) and subsection 203(6) be amended to require a flexibility term to require employers to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee.

**Item 16 – At the end of subsection 204(3)**

69. This item inserts a legislative note to subsection 204(3) which explains that an employer does not contravene a flexibility term in the circumstances set out in new section 204A (inserted by item 18).

**Item 17 – Subsection 204(4)**

70. This item repeals and substitutes subsection 204(4) which provides for termination of an arrangement that was intended to be an individual flexibility arrangement but which does not meet the requirements set out in section 203.

71. This amendment is consequential upon item 15 and does not alter the existing position. The ability for either party to terminate an individual flexibility arrangement that does not comply with the requirements in section 203 by giving not more than 28 days' notice, or at any time by agreement in writing, does not change.

**Item 18 – After section 204**

72. If an individual flexibility arrangement does not satisfy a requirement in section 203, as reflected in the relevant enterprise agreement flexibility term, the arrangement continues to have effect as if it were an individual flexibility arrangement, but the flexibility term will have been contravened (subsection 204(3)).

73. This item inserts new section 204A. New section 204A provides that an employer does not contravene a flexibility term of a modern award in relation to a particular individual flexibility arrangement if, at the time when the arrangement is made, the employer reasonably believes that the requirements of the term were complied with, so far as the requirements are applicable to the arrangement.

74. This provides an employer with a defence to an alleged contravention of a flexibility term provided that the employer's belief that they had complied with the requirements, based

on the facts and circumstances in existence at the time of making the individual flexibility arrangement, was reasonable. In these circumstances an employer will not breach the civil remedy provision in section 50 and will not be exposed to liability in respect of the alleged contravention of a flexibility term.

75. The genuine needs statement required to be included in an individual flexibility arrangement by new subsection 203(4A) (inserted by item 14) would be available 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 204A (inserted by item 18).

76. This amendment responds to the Fair Work Review Panel's recommendation (recommendation 11) that the Fair Work Act be amended to provide a defence to an alleged contravention of a flexibility term under subsection 145(3) or subsection 204(3).

## **Part 5 – Greenfields agreements**

### **Overview**

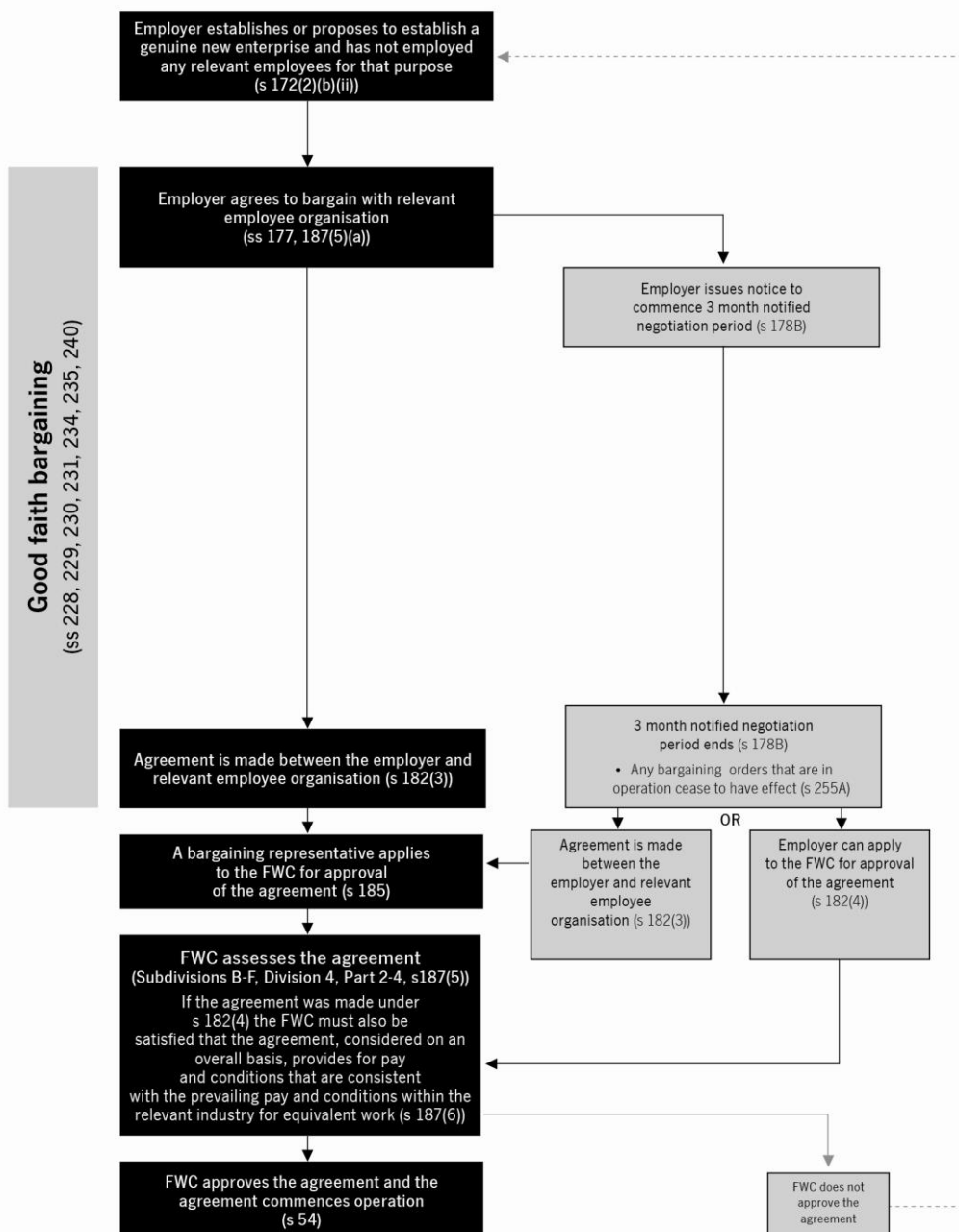
77. Part 2-4 of the Fair Work Act provides a framework for the making of enterprise agreements through a process of collective bargaining in good faith. This is achieved through the use of the *bargaining representative* concept. However, unlike other forms of agreement making under the Fair Work Act, there is currently no provision for bargaining representatives for single-enterprise agreements that are greenfields agreements. This means that there is no requirement for the parties to bargain in good faith, nor any formal capacity for the FWC to assist with greenfields bargaining disputes.

78. The Fair Work Review Panel identified that under the existing greenfields agreement making framework in the Fair Work Act 'there is a significant risk that certain bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia' (page 171). The Fair Work Review Panel observed that under the current framework, a union (or unions) that are able to represent the industrial interests of the majority of employees to be employed in a greenfields project are effectively capable of frustrating the making of a greenfields agreement in a timely way. Evidence and submissions provided by business and industry indicated that these risks undermined the need for certainty over labour costs and may delay the commencement of major new projects.

79. Part 5 of Schedule 1 to the Bill amends the Fair Work Act to extend the concept of *bargaining representative* in relation to proposed single-enterprise agreements that are greenfields agreements. This will have the effect of extending rights and obligations that apply to bargaining representatives, including in relation to good faith bargaining, to the negotiation of these agreements. Part 5 will also enable an employer to take a proposed agreement to the FWC for approval where agreement has not been reached within three months of the commencement of a notified negotiation period. The agreement will have to satisfy the existing approval tests under the Fair Work Act and a new requirement that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing standards and conditions within the relevant industry for equivalent work.

80. The diagram below provides an overview of the new process for the making and approval of single-enterprise agreements that are greenfields agreements. The references to 'employer' and 'employee organisation' include references to the plural where relevant.

## BARGAINING FOR A SINGLE-ENTERPRISE GREENFIELDS AGREEMENT





**Fair Work Act 2009****Item 19 – Section 12 (at the end of the definition of *appointment*)**

81. Item 19 amends section 12 of the Fair Work Act to extend the definition of *appointment* of a bargaining representative to include an appointment in relation to a proposed single-enterprise agreement that is a greenfields agreement under new paragraph 177(c).

**Item 20 – Section 12 (definition of *bargaining representative*)**

82. Item 20 amends section 12 of the Fair Work Act by omitting the reference to section 176 and substituting references to sections 176 and 177. The effect of this amendment will extend the definition of *bargaining representative* to persons who negotiate a single-enterprise agreement that is a greenfields agreement under new section 177. The bargaining representatives for a single-enterprise greenfields agreement are an employer that will be covered by the agreement, a person appointed by an employer to be its bargaining representative (if the employer so chooses) and one or more relevant employee organisation(s) that are entitled to represent the industrial interests of the employees who will be covered by the agreement and with which the employer agrees to bargain for the agreement.

**Item 21 – Section 12**

83. Item 21 amends section 12 of the Fair Work Act to insert a definition of *notified negotiation period* in relation to a proposed single-enterprise agreement that is a greenfields agreement. The definition has the meaning given in new section 178B. The notified negotiation period is an optional three month negotiation period that commences when an employer gives written notice to each employee organisation that is a bargaining representative for the agreement, specifying the day on which the three month period is to commence (see item 27).

**Item 22 – Subsection 172(1) (note 2)**

84. Item 22 amends a legislative note under subsection 172(1) to explain that section 183 of the Fair Work Act does not apply to greenfields agreements. The amendments in this Part are not intended to enable an employee organisation to elect whether to become covered by a greenfields agreement. A greenfields agreement will cover an employee organisation if the agreement is made by the organisation (subsection 53(2)), which occurs where:

- the agreement is expressed to cover and is signed by the organisation (subsection 182(3)); or
- where the agreement is made under new subsection 182(4).

**Item 23 – After subsection 176**

85. Item 23 inserts new section 177, which identifies persons who are bargaining representatives for single-enterprise agreements that are greenfields agreements. This item does not affect multi-enterprise greenfields agreements.

86. The effect of this amendment is to extend obligations and rights of bargaining representatives to parties negotiating single-enterprise greenfields agreements. For example, bargaining representatives for a single-enterprise greenfields agreement must meet the good faith bargaining requirements set out in section 228, may apply for bargaining orders under section 229 and may apply to the FWC to deal with a dispute about the proposed agreement under section 240.

87. Under new paragraph 177(a), the employer (or two or more employers that are single interest employers (see subsection 172(5)) that will be covered by a single-enterprise greenfields agreement will be a bargaining representative. This is consistent with the approach in paragraph 176(1)(a) in relation to proposed enterprise agreements that are not greenfields agreements.

88. Under new paragraph 177(b), an employee organisation with which the employer agrees to bargain will be a bargaining representative for the single-enterprise greenfields agreement. New subparagraph 177(b)(i) provides that an employee organisation that is a bargaining representative for the proposed single-enterprise greenfields agreement must be entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to the work performed under the agreement. This provision is consistent with the definition of a *relevant employee organisation* for the negotiation of a greenfields agreement that is provided at section 12 of the Fair Work Act.

89. Under new subparagraph 177(b)(ii), for an employee organisation to become a bargaining representative for a single-enterprise greenfields agreement, the employer must agree to bargain with it. Whether and when an employer has agreed to bargain will be a question of fact. An employer could, for example, agree to bargain with an employee organisation by writing to it requesting to commence bargaining in relation to a proposed new enterprise.

90. An employer is not required to agree to bargain with every employee organisation that is able to represent the industrial interests of one or more employees to be covered by the agreement. However, in order to approve a greenfields agreement, the FWC must be satisfied that the employee organisation(s) that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement (see paragraph 187(5)(a)). Therefore, an employer will need to have regard to whether the employee organisation(s) with which it agrees to bargain would satisfy this requirement.

91. Under new paragraph 177(c), the employer may appoint a person, in writing, such as an organisation of employers or a consultant, to act as the employer's bargaining representative for the single-enterprise greenfields agreement. This is consistent with the approach in paragraph 176(1)(d) in relation to proposed enterprise agreements that are not greenfields agreements.

**Illustrative example**

Kate's Pro Constructions Pty Ltd (KPC) wishes to make a greenfields agreement for a new development project which is a genuine new enterprise. There are three unions that are each eligible to represent the employees who will be covered by the agreement in relation to work to be performed under the agreement. These unions are 'relevant employee organisations' within the meaning of section 12 of the Fair Work Act. No one union has majority coverage.

The KPC group has a history of dealing with two of those unions on previous projects. Together, these two unions are eligible to represent the majority of employees who will be covered by the agreement in relation to work to be performed under the agreement. KPC initiates bargaining with these two unions by writing to invite them to meet in order to negotiate terms to be included in the agreement. The two unions agree to bargain with KPC and the parties are bargaining representatives for the agreement. Although the third union would like to participate in bargaining for the agreement, KPC has not agreed to bargain with that union and it will not be a bargaining representative within the meaning of new section 177 of the Fair Work Act.

**Item 24 – At the end of subsection 178(2)**

92. Item 24 inserts new paragraph 178(2)(c) that will apply when an employer appoints a bargaining representative for a single-enterprise greenfields agreement. New paragraph 178(2)(c) provides that if an employer appoints a bargaining representative for a proposed single-enterprise greenfields agreement, a copy of the instrument of appointment must be given, on request, to an employee organisation that is a bargaining representative for the agreement. This is consistent with the approach in relation to proposed enterprise agreements that are not greenfields agreements.

**Item 25 – Paragraph 178A(3)(b)**

93. Item 25 amends paragraph 178A(3)(b) to make clear that if an employer appoints a bargaining representative for a proposed enterprise agreement other than a single-enterprise agreement that is a greenfields agreement and revokes that appointment, the revocation instrument must be given to the bargaining representative and on request to a bargaining representative of an employee.

**Item 26 – After subsection 178A(3)**

94. This item inserts new subsection 178A(3A) to provide that if an employer appoints a bargaining representative for a proposed single-enterprise greenfields agreement, and revokes that appointment by written instrument, a copy of the instrument of revocation must be given, on request, to a bargaining representative for the agreement. This is consistent with the approach in relation to proposed enterprise agreements that are not greenfields agreements.

**Item 27 – At the end of Division 3 of Part 2-4**

95. Currently, there is no provision under the Fair Work Act to formally provide for the expeditious negotiation of greenfields agreements. Item 27 inserts new section 178B to provide such a process in relation to a proposed single-enterprise agreement that is a greenfields agreement. The effect of this amendment is to enable an employer to give written

notice to each employee organisation that is a bargaining representative for the agreement to commence a three month notified negotiation period for the agreement.

96. New subsection 178B(1) provides that the notice must be given to each employee organisation that is a bargaining representative for the agreement and must specify the day on which the notified negotiation period for the agreement will commence. Under new paragraph 178B(2)(a), if one employee organisation is a bargaining representative for the agreement, the day specified in the notice must be later than the day on which the employer gave the notice to that organisation. Under new paragraph 178B(2)(b), if two or more employee organisations are bargaining representatives for the agreement, the day specified in the notice must be later than the last day that the employer gave the notice to any of those organisations.

97. If two or more employers are bargaining representatives for the agreement (that is, they are single interest employers (see subsection 172(5)), only one of those employers is required to give notice to the employee organisation(s) to commence the notified negotiation period. New subsection 178B(3) provides that a notice given by one of the employers will have no effect unless the other employers agree to the giving of the notice. The amendments do not compel an employer to issue a notice to the employee organisation(s) for a single-enterprise greenfields agreement. If an employer chooses not to issue the notice, bargaining for the agreement will proceed within the existing good faith bargaining framework of the Fair Work Act, until an agreement is reached. However, if an employer chooses to issue the notice (whether at the time it agrees to bargain for the agreement or after bargaining has commenced), bargaining for the proposed single-enterprise greenfields agreement will proceed (or continue) for a period of three months from the day specified in the notice, after which time the good faith bargaining framework will cease to apply (see new sections 255A and 271A) and the employer may apply to the FWC for approval of the agreement under new subsection 182(4).

98. New section 178B provides that a notice must be given to each employee organisation that is a bargaining representative in writing. Whether an employer has provided written notice to each employee organisation that is a bargaining representative for the agreement will be a question of fact. An employer could, for example, write to each employee organisation or send an email notifying them that the notified negotiation period will commence on the specified day.

**Illustrative example**

This example continues the example given for new subsection 177 above.

KPC and the two unions begin negotiations through a series of meetings. Two weeks after those meetings commenced, KPC raises concerns that the unions are not bargaining in good faith. On 22 February, the company subsequently applies to the FWC seeking bargaining orders to remedy the alleged contraventions and simultaneously issues a written notice to one of the unions by email outlining that for the purposes of section 178B of the Fair Work Act, a three-month notified negotiation period will start on 1 March. On 24 February, KPC notifies the other union to the same effect via registered post.

As the day specified in the notices to the unions was later than the day that KPC issued the notice to the second union, the requirement at new paragraph 178B(2)(b) is satisfied.

**Item 28 – At the end of section 182**

99. Section 182 of the Fair Work Act provides for the point in time at which an enterprise agreement is made. Under subsection 182(3), a single-enterprise agreement or multi-enterprise agreement that is a greenfields agreement is made when the agreement is signed by each employer and each employee organisation that the agreement is expressed to cover.

100. Item 28 inserts new subsection 182(4) which sets out an optional new process for the making of single-enterprise greenfields agreements where the bargaining representatives have been unable to make a greenfields agreement under subsection 182(3).

101. New subsection 182(4) provides that where:

- an employer that is a bargaining representative for a single-enterprise greenfields agreement gives notice of the notified negotiation period to the employee organisation(s) (provided under new section 178B); and
- the notified negotiation period has ended; and
- the employer gave each employee organisation that was a bargaining representative for the agreement a reasonable opportunity to sign the agreement and the employee organisation(s) did not sign the agreement (such that the agreement is not made under subsection 182(3));

the employer can apply to the FWC to approve the agreement. The agreement is taken to have been made between the employer and the employee organisation(s) when the employer applies to the FWC to approve the agreement.

102. Section 12 of the Fair Work Act defines when an enterprise agreement is ‘made’ by reference to section 182. This definition encompasses agreements that are ‘taken to have been made’ under subsection 182(4). Where new paragraphs 182(4)(a) to (e) are satisfied, an agreement is taken to have been made between the parties when the employer applies to the FWC to approve the agreement.

103. Under new paragraph 182(4)(d) an employer is required to give each employee organisation a reasonable opportunity to sign the agreement. This is intended to ensure that

the agreement that an employer takes to the FWC for approval is the same (but not necessarily the last version) as was provided during negotiations to the employee organisation. The opportunity to sign the agreement may occur before or after the notified negotiation period ends. Whether the opportunity given to an employee organisation to sign an agreement is reasonable will depend on the facts and circumstances of bargaining. The intention is that the employee organisation would have sufficient time to consider the agreement before it is submitted to the FWC for approval. For example, a shorter consideration time could be applied where the employee organisation is already familiar with the content of the agreement.

104. Where an agreement is made under new subsection 182(4), the FWC will consider whether to approve it having regard to the existing approval requirements in Subdivisions B to F, Division 4 of Part 2-4, including that it passes the better off overall test (paragraph 186(2)(d)), that the relevant employee organisation(s) to be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement (paragraph 187(5)(a)) and that it is in the public interest to approve the agreement (paragraph 187(5)(b)). In assessing the public interest, it is not intended that the FWC would refuse to approve an agreement on public interest grounds by reference to the conduct of the bargaining representatives during negotiations. This can be compared to the position under subsection 187(2), where the FWC is required to consider whether approving an agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

105. In addition, the FWC will be required to consider a new criterion that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work (see new subsection 187(6)).

106. If the FWC is concerned that the agreement does not meet these approval requirements, it may accept written undertakings from the employer under section 190 that addresses those concerns. However, if the FWC is not satisfied that the agreement meets the agreement approval requirements, the FWC may refuse to approve the agreement. This is consistent with the existing approach in relation to single-enterprise greenfields agreements that are made under subsection 182(3).

107. A legislative note at the end of new subsection 182(4) refers the reader to new section 185A, which deals with the material that must accompany an application under subsection 182(4) for the approval of an enterprise agreement.

**Illustrative example**

This example continues the example given for new section 178B above.

When the notified negotiation period expired, KPC and the unions had not reached agreement on certain terms of the proposed greenfields agreement. KPC agrees to continue to negotiate after the end of the notified negotiation period. However, the good faith bargaining framework will no longer apply (new sections 255A and 271A).

On 8 June, having determined that an impasse has been reached on the outstanding terms, KPC gives its preferred agreement to the unions to sign, which they now have time to consider. The agreement contains both the terms and conditions that were agreed with the unions and KPC's preferred terms on matters that had not been settled with the unions.

If the unions sign the proposed single-enterprise greenfields agreement, the agreement will be made under subsection 182(3), submitted to the FWC under subsection 185(1) and considered by the FWC under the existing greenfields agreement approval rules in Subdivisions B to F, Division 4 of Part 2-4.

If the unions do not sign the proposed greenfields agreement, KPC will be able to apply to the FWC for approval of that agreement under new subsection 182(4). When the application for the approval of the agreement is made, the agreement will be taken to be made between KPC and the unions. The application must be submitted in accordance with new section 185A and the FWC will consider whether to approve it under the existing approval rules in Subdivisions B to F, Division 4 of Part 2-4 and the new criterion in new subsection 187(6).

**Item 29 – Subsection 185(1A)****Item 30 – At the end of section 185**

108. Section 185 deals with applications for the approval of an enterprise agreement. Subsection 185(1) requires a bargaining representative to apply for FWC approval of an enterprise agreement that has been made.

109. This item makes a consequential amendment to subsection 185(1A) to clarify that the alternative rule that requires an employer or relevant employee organisation to apply for approval of a greenfields agreement will only apply to multi-enterprise greenfields agreements. The amendment is consequential because an employer or relevant employee organisation that applies for the approval of a single-enterprise greenfields agreement that is made under subsection 182(3) is, by new subsection 177 (see item 23), a 'bargaining representative' for the agreement such that the application for approval rule in subsection 185(1) will apply instead of subsection 185(1A).

110. Item 30 inserts new subsection 185(6) to make clear that section 185 does not apply to a single-enterprise greenfields agreement that is made under new subsection 182(4). Unlike other enterprise agreements, single-enterprise greenfields agreements that are made under subsection 182(4) are made at the same time as when they are submitted to the FWC for approval. Similar procedural rules about what material must accompany the application for approval are provided in new section 185A (see item 31).

**Item 31 – At the end of Subdivision A of Division 4 of Part 2-4**

111. Item 31 inserts new section 185A which sets out the material that must accompany an application under subsection 182(4) for FWC approval of a single-enterprise greenfields agreement that is made under that section. The application for approval must be accompanied by a copy of the agreement and any other declarations required by the procedural rules of the FWC. The power for the FWC to make procedural rules about the requirements for making an application is set out in section 609. This enables the FWC to make procedural rules about the form and content of the declarations that must accompany the agreement. This is consistent with the existing requirement in subsection 185(2) that applies to other types of enterprise agreements. It is not intended that the requirement to provide declarations under the procedural rules are capable of frustrating the FWC from considering, and dealing with, an application under subsection 182(4) for approval of a greenfields agreement.

**Item 32 – Subsection 186(1)****Item 34 – Paragraph 190(1)(a)****Item 35 – Subsection 192(1)****Item 36 – Subsection 193(6)****Item 38 – Paragraph 211(1)(a)****Item 39 – Paragraph 211(4)(d)**

112. These items amend provisions of the Fair Work Act that deal with, relevantly, applications for the approval of enterprise agreements that were made under section 185. The items insert a reference to single-enterprise agreements that are made under new subsection 182(4), consequential on the amendment in item 28.

**Item 33 – At the end of section 187**

113. Section 187 of the Fair Work Act sets out additional requirements that must be met before the FWC approves an enterprise agreement. The section also contains specific requirements in relation to greenfields agreements about which the FWC must be satisfied before it approves the agreement.

114. This item inserts new subsection 187(6) to provide an additional approval requirement that must be met where a single-enterprise agreement that is a greenfields agreement has been made under new subsection 182(4) (that is, the parties have been unable to make an agreement under subsection 182(3)). It requires the FWC to be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

115. The requirement for the FWC to assess an agreement on an ‘overall’ basis is intended to make clear that not all entitlements in comparable instruments need to be reflected in the agreement. Provided that the agreement is consistent with prevailing industry pay and conditions when considered overall, the requirement will be satisfied.

116. Guidance on the factors that the FWC may have regard to in considering whether the agreement provides for pay and conditions that are consistent with prevailing pay and



conditions within the relevant industry for equivalent work is provided in a legislative note under the new subsection. That is, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area. This is intended to make clear that the FWC would not be required to ensure that the pay and conditions provided in the agreement are comparable to existing enterprise agreements across Australia. It is not intended that the reference to prevailing pay and conditions would involve an exhaustive analysis of every source of employment entitlement in a particular industry and in most cases it is expected that it would be appropriate to compare the proposed agreement to a small number of comparable enterprise agreements.

117. It is intended that the FWC could be satisfied of this new approval requirement in circumstances where the FWC is unable to determine whether an agreement is consistent with the prevailing pay and conditions within the relevant industry for equivalent work because it is a new industry (such that making a meaningful assessment of prevailing industry pay and conditions is not possible).

118. This new approval requirement is not intended to modify or delay the current timeframes for FWC consideration and finalisation of these agreements. That is, the approvals process for these agreements is intended to be consistent with the overall purpose of the amendments in this Part to ensure the expeditious negotiation of single-enterprise greenfields agreements and the commencement of new businesses.

119. Where the approval requirements have not been met, the amendments made by this Part do not modify the existing position that the FWC may approve the agreement with undertakings (section 190) or not approve the agreement, such that the employer would need to recommence the negotiation process.

### **Illustrative example**

This example continues the example given for new subsection 182(4) above.

After the unions did not agree to sign the proposed greenfields agreement, KPC makes an application for approval of the agreement to the FWC. The FWC considers whether the agreement meets the relevant approval requirements in Subdivisions B to F, Division 4 of Part 2-4, including that it does not contravene section 55 (which deals with the interaction with the NES), that it passes the better off overall test, that the unions to be covered by the agreement (that is, the union bargaining representatives that bargained for the agreement) are, taken as a group, entitled to represent the industrial interests of the majority of employees to be covered by the agreement, and that it is in the public interest to approve the agreement.

As KPC's proposed greenfields agreement was made under new subsection 182(4), the FWC must also be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry in which KPC operates, for equivalent work.

If the FWC approves the agreement, it will operate from seven days after the agreement is approved or a later day specified in the agreement. The FWC must also note in its decision to approve the agreement, that it covers the two unions that were bargaining representatives for the agreement.

**Item 37 – After subsection 201(2)**

120. Section 201 of the Fair Work Act requires the FWC to note certain matters in its decision to approve an enterprise agreement. This item inserts new subsection 201(2A) to provide that if the FWC approves a single-enterprise greenfields agreement that was made under subsection 182(4), the FWC must note in its decision to approve the agreement that the agreement covers each employee organisation that was a bargaining representative for the agreement.

121. This item is intended to ensure that employees who will be covered by the agreement will have representation under the agreement when they commence their employment.

**Item 40 – At the end of subsection 228(1)****Item 41 – At the end of subsection 229(1)****Item 42 – At the end of subsection 230(1)****Item 43 – At the end of section 232****Item 45 – At the end of section 234****Item 46 – At the end of subsection 235(1)****Item 48 – At the end of subsection 240(1)**

122. These items insert a legislative note to refer the reader to new section 255A, which provides for a limitation on the operation of sections 228, 229, 230, 234, 235 and 240 in relation to bargaining for a single-enterprise greenfields agreement and to which the notified negotiation period has ended.

**Item 44 – Section 234 (note)**

123. This item is consequential on item 45 which inserts a second legislative note at the end of section 234.

**Item 47 – Subsection 238(1)**

124. Section 238 of the Fair Work Act enables a bargaining representative for a proposed single-enterprise agreement to apply to the FWC for a scope order if the representative has concerns that bargaining for the proposed agreement is not proceeding efficiently or fairly because the agreement will not cover the appropriate employees, or will cover employees that is not appropriate for the agreement to cover.

125. This item amends subsection 238(1) to provide that a bargaining representative for a proposed single-enterprise agreement other than a greenfields agreement may apply to the FWC for a scope order in relation to the agreement. This amendment maintains the existing position that an application for a scope order cannot be made in respect of a proposed greenfields agreement.

**Item 49 – At the end of subsection 255(1)**

126. Section 255 of the Fair Work Act provides that Part 2-4 does not empower the FWC to make certain orders. This item inserts new paragraphs 255(1)(d), (e) and (f), which relate to the notice requirements for commencing the notified negotiation period under new section 178B. The item restricts the FWC from making orders that require or have the effect of requiring:

- an employer to give a notice to commence the notified negotiation period to an employee organisation that is a bargaining representative for a single-enterprise greenfields agreement, under paragraph 178B(1)(a); or
- an employer to specify a particular day in a notice for the notified negotiation period under paragraph 178B(1)(b); or
- for an employer to agree to the giving of a notice for the notified negotiation period, under subsection 178B(3) (for example, where two or more employers are bargaining representatives for a single-enterprise greenfields agreement).

**Item 50 – After section 255**

127. This item inserts new section 255A, which deals with the FWC's general role in facilitating bargaining in respect of single-enterprise greenfields agreements. Section 255A limits the good faith bargaining framework where there has been a notified negotiation period in relation to bargaining for a single-enterprise greenfields agreement and the notified negotiation period has ended. This is intended to ensure the proper interaction between the good faith bargaining framework and the notified negotiation period such that an employer can apply to the FWC for the approval of its agreement under subsection 182(4). The item does not apply where an employer bargaining representative has not issued a notice to commence the notified negotiation period. Where a notice is not issued, the good faith bargaining framework will continue to apply to negotiations for the agreement.

128. The effect of the item is that when the notified negotiation period ends, the following provisions do not apply (that is, they are 'switched off') in relation to the agreement at any time after the end of the notified negotiation period:

- section 228, which deals with good faith bargaining requirements (subparagraph 255A(d)(i));
- sections 229 and 230, which deal with applications for and the making of bargaining orders (subparagraph 255A(d)(ii)). Further, under new paragraph 255A(1)(e), any bargaining order that the FWC made in relation to the agreement ceases to have effect following the end of the notified negotiation period;
- sections 234 and 235, which deal with applications for and the making of serious breach declarations (subparagraph 255A(d)(iii));
- section 240, which deals with the FWC's ability to deal with bargaining disputes (subparagraph 255A(d)(iv)).

129. This means for example, that any bargaining orders that were made before the end of the notified negotiation period cease to have effect at the end of the notified negotiation period, irrespective of whether the order was expressed to apply for a period after the notified negotiation period. Similarly, an application for a bargaining order cannot be made in relation to the agreement after the end of the notified negotiation period.

**Item 51 – At the end of subsection 269(1)**

130. Item 51 inserts a legislative note at the end of subsection 269(1) which deals with bargaining related workplace determinations, to refer the reader to new section 271A which limits the operation of section 269 following the end of a notified negotiation period in relation to bargaining for a single-enterprise greenfields agreement.

**Item 52 – At the end of Division 4 of Part 2-5**

131. Item 52 inserts new section 271A to limit the FWC's role in making a bargaining related workplace determination under section 269 of the Fair Work Act in relation to bargaining for a single-enterprise greenfields agreement. The limitation will apply where there has been a notified negotiation period and the notified negotiation period subsequently ends. The item does not apply where an employer bargaining representative has not issued a notice to commence the notified negotiation period.

132. The effect of this item is that where a bargaining related workplace determination process has commenced but is not finalised before the end of the notified negotiation period, the employer will be able to apply to the FWC for approval of its single-enterprise greenfields agreement under subsection 182(4). This item is consistent with the approach taken in relation to limiting the good faith bargaining framework provided in new section 255A (see item 50).

**Part 6 – Transfer of business**

***Fair Work Act 2009***

**Item 53 – Section 12 (paragraph (a) of the definition of *transfer of business*)**

133. Item 53 amends the definition of *transfer of business* so that it is defined by reference to subsection 311(1) and new subsection 311(1A).

**Item 54 – After subsection 311(1)**

**Item 55 – At the end of section 768AD**

134. As a general rule, where there is a transfer of business situation the old employer's enterprise agreement or other relevant industrial instrument will continue to cover the employee and the new employer in relation to the transferring work regardless of how the employee came to be employed with the new employer. The only way that continued coverage does not occur is if there is an order to that effect from the FWC.

135. The Fair Work Review Panel recommended that the Fair Work Act be amended to make it clear that when employees, on their own initiative, seek to transfer to an associated entity of their current employer they will be subject to the terms and conditions of

employment provided by the new employer (recommendation 38). Items 54 and 55 implement that recommendation.

136. Item 54 inserts a new subsection 311(1A) after subsection 311(1).

137. New subsection 311(1A) ‘switches off’ the transfer of business rules contained in Part 2-8 of the Fair Work Act in the case of an employee who becomes employed with an associated entity of his or her former employer after seeking that employment on his or her own initiative before the termination of the employee’s employment with the old employer. That employee will then be covered by the relevant industrial instrument (if any) that covers the type of work performed for the new employer by the employee. The effect will be that the new employer will no longer be required to seek orders from the FWC to achieve that outcome. The normal rules concerning an employee’s continuity of service in section 22 are not affected by this amendment.

138. The reference in paragraph 311(1A)(b) to employment terminating is intended to capture all of the circumstances in which employment ceases, including resignation and termination by operation of law (for example, temporary contract).

139. In order to determine whether an employee sought to become employed on his or her own initiative before the termination of his or her employment with the old employer it will be necessary to consider the circumstances giving rise to the creation of the new employment relationship. For example, an employee may be considered to have sought employment on his or her own initiative where an employer provides information about job opportunities within the corporate group which the employee then chooses to pursue for career progression or lifestyle reasons.

140. However, it is not intended that an employee who accepts alternative employment within a corporate group in the context of an organisational restructure would be covered by the new provision (for example, in a redundancy or redeployment scenario). In such cases, the employee’s move from one employer to another arises from an operational decision made by the employer and is not properly characterised as occurring at the initiative of the employee. In these circumstances it is intended that the transfer of business rules would apply and an order from the FWC under section 318 would be required to displace coverage of the old employer’s industrial instrument.

141. Item 55 inserts new subsections 768AD(5) and (6) at the end of section 768AD. New subsection 768AD(5) provides that there is no transfer of business ‘connection’ for the purpose of paragraph 768AD(1)(d) when a person becomes employed with an associated entity of his or her old State employer after seeking that employment on his or her own initiative before the termination of the person’s employment with the old State employer. This means that the person will be covered by the relevant industrial instrument (if any) that covers the type of work performed for the new national system employer by the person. New subsection 768AD(6) preserves the person’s continuity of service by providing that the rules in sections 768BL, 768BM and 768BN are not affected. Those provisions will continue to operate as if there had been a transfer of business.

142. The reference in paragraph 768AD(5)(b) to employment terminating is intended to capture all of the circumstances in which employment ceases including resignation and termination by operation of law (for example, temporary contract).

143. In order to determine whether a person sought to become employed at his or her own initiative for the purposes of paragraph 768AD(5)(b) the same considerations referred to at paragraphs 139 and 140 above in relation to paragraph 311(1A)(b) will be relevant.

## **Part 7 – Protected action ballot orders**

### ***Fair Work Act 2009***

#### **Item 56 – After subsection 437(2)**

144. This item inserts new subsection 437(2A), which provides that an application for a protected action ballot order cannot be made unless there has been a ‘notification time’ in relation to the proposed enterprise agreement. The legislative note underneath the provision directs the reader to the definition of *notification time* in subsection 173(2).

145. The Fair Work Review Panel recommended that the Fair Work Act be amended so that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained (recommendation 31). This recommendation concerns the ‘strike first, talk later’ issue that was considered by the Full Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53. Item 56 implements that recommendation.

146. The Fair Work Review Panel further recommended that the Fair Work Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement (see *Stuartholme v Independent Education Union* [2010] FWAFB 1714 and *MSS Security v LHMU* [2010] FWAFB 6519) (recommendation 31). The amendment implements this recommendation by including a legislative note to make clear that disagreement over the scope of a proposed enterprise agreement does not, of itself, prevent the taking of protected industrial action.

147. The new subsection does not displace any of the existing requirements under the Fair Work Act relating to the taking of protected industrial action. These requirements include that an applicant for a protected action ballot order must be genuinely trying to reach agreement from the notification time until a protected action ballot order is made (paragraph 443(1)(b)), the common requirements for industrial action to be protected (section 413) and the notice requirements for industrial action (section 414).

## **Part 8 – Right of entry**

### **Overview**

148. Part 3-4 of the Fair Work Act confers rights on officials of organisations who hold entry permits to enter premises and exercise certain powers while on those premises. The object of the Part is to establish a framework under which permit holders may enter premises for investigation and discussion purposes, which appropriately balances the rights of organisations to represent their members in the workplace, the right of employees to be represented at work and the right of occupiers of premises to go about their business without undue inconvenience.

149. While the Bill will make a range of amendments to Part 3-4 it will not amend Subdivision AA of Division 2 of Part 3-4 which provides special entry rights for permit

holders seeking to enter to investigate suspected contraventions relating to Textile, Clothing and Footwear award workers. Specifically, however, the Bill will:

- repeal amendments made by the *Fair Work Amendment Act 2013* that required 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; and
- expand the FWC’s capacity to deal with disputes about the frequency of visits to premises for discussion purposes.

### ***Fair Work Act 2009***

#### ***Repeal of amendments made by Schedule 4 to the Fair Work Amendment Act 2013***

150. Schedule 4 to the *Fair Work Amendment Act 2013* inserted Division 7 into Part 3-4 to address circumstances in which permit holders or an organisation and occupiers have been unable to reach agreement on accommodation and transport arrangements in remote areas. Items 57, 59, 60, 69 and 70 of Part 8, Schedule 1 to the Bill repeal these amendments.

#### **Item 57 – Section 12 (definition of *accommodation arrangement*)**

#### **Item 59 – Section 12 (definition of *transport arrangement*)**

#### **Item 60 – Section 478**

#### **Item 69 – Division 7 of Part 3-4**

#### **Item 70 – Subsection 539(2) (cell at table item 25, column headed “Civil remedy provision”)**

151. Items 57 and 59 remove signpost definitions of *accommodation arrangement* and *transport arrangement* from the Dictionary in section 12. These signpost definitions are unnecessary as a consequence of the repeal of Division 7 of Part 3-4.

152. Item 60 omits the reference to Division 7 from the guide to Part 3-4 in section 478, consequential to the repeal of Division 7.

153. Item 69 repeals Division 7 of Part 3-4.

154. Item 70 omits the references to subsections 521C(3) and 521D(3) from the table in subsection 539(2) of the Fair Work Act, consequential upon the repeal of Division 7 of Part 3-4.

*Amendments relating to entry for discussion purposes***Item 61 – Section 484**

155. Section 484 deals with when a permit holder may enter premises for the purposes of holding discussions. Currently, section 484 provides that a permit holder may enter premises to hold discussions with persons at the premises if one or more of those persons:

- perform work on the premises;
- are entitled to be represented by the permit holder's organisation; and
- wish to participate in discussions.

156. Item 61 repeals and replaces existing section 484 of the Fair Work Act. New section 484 provides for new criteria that a permit holder's organisation must satisfy in order to exercise entry for discussion purposes.

157. New subsection 484(1) provides for right of entry for discussion purposes in circumstances where the permit holder's organisation is covered by the enterprise agreement that applies to work performed on the premises. A permit holder may hold discussions with persons who satisfy the criteria set out in new paragraphs 484(1)(a) to (c). New paragraphs 481(1)(d) and (e) provide that a permit holder may enter premises for the purposes of holding discussions with those persons if an enterprise agreement applies to the workplace, and the permit holder's organisation is covered by the agreement.

158. New subsection 484(2) provides for right of entry for discussion purposes in circumstances where the permit holder's organisation is not covered by an enterprise agreement. A permit holder may hold discussions with persons who satisfy the criteria set out in new paragraphs 484(2)(a) to (c). A permit holder may hold discussions with those persons if:

- either:
  - an enterprise agreement applies to work performed on the premises, but the enterprise agreement does not cover the permit holder's organisation (new subparagraph 484(2)(d)(i)); or
  - no enterprise agreement applies to work performed on the premises (new subparagraph 484(2)(d)(ii)), and
- the organisation has been invited to send a representative to the premises by a member or prospective member who performs work on the premises, and whose industrial interests the permit holder's organisation is entitled to represent (new subparagraphs 484(2)(e)(i) and (ii)).

159. New subsection 484(2) requires a member or prospective member who performs work at the premises to invite the organisation to send a representative to the premises to hold discussions. A legislative note to new subsection 484(2) refers the reader to the FWC's power to issue an invitation certificate under new section 520A that states that the FWC is satisfied that the organisation has been invited. However, it is not mandatory for an organisation to



apply for an invitation certificate to demonstrate that the invitation requirement has been satisfied. Rather, it is intended that, for example, a letter or voluntary statement from the member or prospective member who issued the invitation stating that he or she has extended such an invitation will be sufficient to demonstrate that the invitation requirement has been satisfied.

160. Legislative notes to new subsections 484(1) and (2) refer the reader to:

- the FWC's power under section 508 to deal with the misuse of rights by a permit holder or organisation;
- obligations on persons under sections 501 and 502 not to refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder; and
- the requirement in paragraph 487(1)(b) to provide notice to the occupier of entry for discussion purposes and that once a permit holder has provided such notice, he or she may hold discussions with any eligible persons on the premises.

#### **Item 67 – After Subdivision D of Division 6 of Part 3-4**

161. Division 6 of Part 3-4 of the Fair Work Act sets out provisions relating to the issuing of, and details to be included in, entry permits, entry notices, exemptions certificates and affected member certificates. Item 67 inserts new Subdivision DA into Division 6 of Part 3-4 of the Fair Work Act to require the FWC to issue invitation certificates in certain circumstances.

162. An invitation certificate will demonstrate that the FWC is satisfied that a member or prospective member has requested the presence of the permit holder's organisation, while protecting the identity of the member or prospective member. This is intended to provide certainty for an occupier that a request has in fact been made in circumstances where it is not verified that a request was made, and that, as such, the requirements in section 484 relating to an invitation have been met.

163. As noted above, an organisation is not required to apply for a certificate in relation to every occasion upon which the organisation or one of its permit holder's seeks to exercise a right of entry for discussion purposes. However, the ability to apply for such a certificate prevents the need to disclose the identity of the member or prospective member of an organisation who has extended an invitation to the organisation to attend the premises.

164. New subsection 520A(1) provides that, upon application by an organisation, the FWC must issue an invitation certificate if the FWC is satisfied that a member, or prospective member, of the organisation whom the permit holder's organisation is entitled to represent, performs work on particular premises to be entered and has invited the organisation to send a representative to the premises for the purposes of holding discussions with persons at the premises.

165. New subsection 520A(2) lists the content requirements for an invitation certificate. An invitation certificate is required to state the following:

- the premises to which it relates;
- the organisation to which it relates; and
- that the FWC is satisfied of the matters in new subsection 520A(1).

166. New subsection 520A(3) provides that the FWC must specify an expiry date in an invitation certificate. The invitation certificate ceases to have effect at the end of the date specified.

167. New subsection 520A(4) provides that, in specifying an expiry date in an invitation certificate, the FWC must comply with any limitations, restrictions or requirements prescribed by the Fair Work Regulations.

168. New subsection 520A(5) provides that an invitation certificate must not reveal the identity of the member or prospective member to whom it relates. This is intended to protect the privacy of a person who invites an organisation to send a representative to the premises.

169. A decision under new section 520A is appealable under section 604 of the Fair Work Act.

170. The President of the FWC may, in writing, delegate the functions of the FWC under Division 6 of Part 3-4 to the General Manager, an SES employee of the FWC, or a member of staff of the FWC who is in a class of employees prescribed by the Fair Work Regulations (paragraph 625(2)(g) and subsection 625(3)). The delegation of procedural powers of this kind is intended to ensure the efficient operation of the FWC.

171. It is intended that the FWC will be able to issue invitation certificates promptly upon receiving an application, to ensure that a permit holder may hold discussions within a reasonable timeframe.

## **Item 58 – Section 12**

172. Item 58 inserts a new signpost definition of *invitation certificate* into the Dictionary at section 12 and refers readers to the definition set out in new subsection 520A(1).

## **Item 68 – Paragraphs 521(a), (b), (c) and (d)**

173. Item 68 makes amendments consequential upon the inclusion of new section 520A, by omitting the words “and affected member certificates” from paragraphs 521(a), (b), (c) and (d) of the Fair Work Act and substituting a reference to both affected member certificates and invitation certificates.

## **Item 71 – After paragraph 601(5)(f)**

174. Section 601 of the Fair Work Act sets out the writing and publication requirements for FWC decisions. Subsection 601(5) provides for a number of exceptions to the requirement to publish certain decisions under subsection 601(4).

175. Item 71 amends subsection 601(5) to include new paragraph 601(5)(fa), consequential upon the amendment made by item 67. New paragraph 601(5)(fa) provides that the FWC is not required to publish a decision to issue, or to refuse to issue, an invitation certificate under section 520A. The volume of these decisions would impose a significant burden on the FWC that is not justifiable, given that these decisions will be routine and uncontroversial.

*Location of discussions*

176. Subdivision C of Division 2 of Part 3-4 of the Fair Work Act sets out mandatory requirements that a permit holder must meet when exercising or attempting to exercise rights under Part 3-4.

177. Section 492 deals with the conduct of interviews or discussions in a particular location.

178. Section 492A requires a permit holder to comply with any reasonable request made by an occupier of premises to take a particular route to reach a room or area for interviews or discussions.

**Item 62 – Sections 492 and 492A**

179. Item 62 repeals section 492 and section 492A, which were significantly amended by the *Fair Work Amendment Act 2013*, and substitutes new section 492. New section 492 returns the provision to the form it took prior to amendment by the *Fair Work Amendment Act 2013*.

180. New subsection 492(1) allows an occupier of premises to request that a permit holder meet employees in a specific room or area of the premises or to take a particular route to that location. The request must be a reasonable request. A legislative note to new subsection 492(1) informs the reader that under subsection 505(1) of the Fair Work Act, the FWC may deal with a dispute about whether the request is a reasonable one.

181. New subsection 492(2) sets out a number of circumstances in which a request will be considered to be unreasonable. The list is non-exhaustive and is not intended to be a comprehensive list of what would constitute an unreasonable request.

182. New paragraph 492(2)(a) provides that a request will be unreasonable if the nominated room or area is not fit for the purpose of conducting the interviews or holding discussions. This is intended to cover situations where the room or area nominated for interviews or discussions is inappropriate or unsafe.

183. New paragraph 492(2)(b) provides that a request will be unreasonable where the request is intended to intimidate, discourage or make it difficult for people to participate in the interview or discussions.

184. New subsection 492(3) clarifies that a request to meet employees in a particular location or to take a particular route to reach that location is not unreasonable solely because the location or route is not the one the permit holder would have chosen.

185. New subsection 492(4) provides that additional circumstances in which a request made under subsection 492(1) is or is not reasonable may be prescribed in the Fair Work Regulations.

*FWC to deal with disputes about frequency of entry***Item 63 – Subsection 505(1)**

186. Item 63 repeals subsection 505(1) of the Fair Work Act and substitutes new subsection 505(1), which returns the wording of the provision to its original form, prior to amendments made by the *Fair Work Amendment Act 2013*. This amendment is consequential upon the amendment made by item 69.

187. New subsection 505(1) of the Fair Work Act provides that the FWC may deal with a dispute about the operation of Part 3-4, including a dispute about whether a request made under either section 491, 492 or 499 is reasonable. This is not an exhaustive list and not intended to limit the kind of disputes that the FWC may arbitrate in relation to the operation of Part 3-4.

188. A legislative note to new subsection 505(1) informs the reader that sections 491, 492 and 499 deal with requests for permit holders to use particular rooms or areas, and comply with occupational health and safety requirements.

**Item 64 – Subsection 505(5)**

189. Item 64 repeals subsection 505(5) and substitutes the wording of the provision in its original form prior to amendment by the *Fair Work Amendment Act 2013*. New subsection 505(5) provides that in dealing with a dispute under Part 3-4, the FWC must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2 or 3 of Part 3-4, unless the dispute is about whether a request under either section 491, 492 or 499 is reasonable.

**Item 65 – Subsection 505A(4)**

190. Item 65 repeals subsection 505A(4). The effect of this is to remove the high threshold that requires the FWC to be satisfied that the frequency of entry by a permit holder or permit holders from the same organisation would require an unreasonable diversion of the occupier's critical resources before it can exercise its power to arbitrate such a dispute.

**Item 66 – Subsection 505A(6)**

191. Item 66 repeals subsection 505A(6) and substitutes new subsections 505A(6) and (7). New subsection 505A(6) provides that in dealing with the dispute, the FWC must take into account the following factors:

- fairness between the parties concerned (see new paragraph 505A(6)(a)); and
- if the dispute relates to an employer – the combined impact on the employer's operations of entries onto the premises by permit holders of organisations (see new paragraph 505A(6)(b)); and
- if the dispute relates to an occupier of premises – the combined impact on the occupier's operations of entries onto the premises by permit holders of organisations (see new paragraph 505A(6)(c)).

192. The effect of new paragraphs 505A(6)(b) and (c) is to require the FWC to have regard to both fairness between the parties to the dispute, and the cumulative impact on the workplace of entries by all organisations, rather than the impact of visits by one or more permit holders of a single organisation. This is intended to address situations in which several organisations frequently utilise entry rights for the purposes of holding discussions or conducting interviews to the detriment of productivity at the site.

193. New subsection 505A(7) provides that, for the purposes of new paragraphs 505A(6)(b) and (c), it is immaterial whether the organisations or permit holders are party to the dispute. This ensures that the FWC may consider the cumulative impact of visits by permit holders of organisations other than the organisation that is party to the dispute.

## **Part 9 – FWC hearings and conferences**

### **Overview**

194. Part 9 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.

### ***Fair Work Act 2009***

#### **Item 72 – Section 12**

195. Section 12 contains the Dictionary to the Fair Work Act. Item 72 inserts a definition of the term *designated application-dismissal power* into the Dictionary to describe the powers available to the FWC under sections 399A and 587 to dismiss unfair dismissal applications.

- Section 399A enables the FWC to dismiss an unfair dismissal application where the applicant has unreasonably failed to attend a conference or hearing, comply with an FWC direction or order, or discontinue an application after a settlement agreement has been concluded.
- Section 587 provides the FWC with a general power to dismiss applications, including those that frivolous or vexatious or have no reasonable prospects of success.

#### **Item 73 – Section 397**

#### **Item 74 – At the end of section 397**

196. Section 397 requires the FWC to hold a hearing or conduct a conference in relation to an unfair dismissal matter if it involves disputed facts. Item 74 inserts new subsection 397(2) to provide that this requirement does not apply when the FWC is deciding whether to exercise a ‘designated application-dismissal power’. Item 73 makes an amendment consequential to item 74.

**Item 75 – At the end of section 399**

197. Section 399 provides that the FWC is only permitted to hold a hearing in relation to a matter arising under Part 3-2 if it considers it appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to deal with the matter. Item 75 inserts new subsection 399(4) which is an avoidance of doubt provision to make it clear that the reference to a ‘hearing in relation to a matter arising under this Part’ in section 399 includes a reference to a hearing for the purposes of deciding whether to exercise a designated application-dismissal power.

**Item 76 – After section 399A**

198. Item 76 inserts new section 399B. It provides that if the FWC decides not to hold a hearing or conduct a conference for the purpose of determining whether to exercise a designated application-dismissal power, the parties must first be invited to provide further information to the FWC that relates to whether the power should be exercised (subsection 399B(1)). The new section also requires the FWC to take account of any information that is provided (paragraph 399B(1)(b)). These requirements will assist in ensuring that procedural fairness is afforded to the parties when the FWC is considering whether to dismiss an unfair dismissal application under section 399A or section 587.

199. New subsection 399B(2) provides that if as a result of the information provided, the FWC considers that it would be desirable to hold a hearing or conduct a conference for the purposes of determining whether to exercise a designated application-dismissal power, it may do so.

**Item 77 – Subsection 587(1) (note)****Item 78 – At the end of subsection 587(1)**

200. Item 78 inserts legislative notes to subsection 587(1) to draw the reader’s attention to section 399 in relation to hearings and to the requirement under section 399B for the FWC to invite the parties to provide further information to the FWC before the FWC decides whether to exercise the designated application-dismissal power in section 587. Item 77 makes an amendment consequential to item 78.

**Part 10 – Unclaimed money*****Fair Work Act 2009*****Item 79 – Before subsection 559(4)**

201. Item 79 inserts new subsections 559(3A), (3B), (3C) and (3D) before subsection 559(4).

202. Section 559 allows an employer to pay to the Commonwealth certain amounts (for example, wages) that it was required to pay to a former employee whom the employer can no longer contact. Payment of the amount to the Commonwealth discharges the employer’s obligation as against the employee, for the amount paid. The former employee can then later claim the money from the FWO.

203. Item 79 amends section 559 so that the FWO may also pay an amount of interest to the former employee.

204. New subsection 559(3A) sets out the circumstances in which interest will be payable. Specifically, interest will be payable where the FWO pays an amount of money under subsection 559(3) and that amount of money has been held in the Consolidated Revenue Fund for six months or more and is an amount of \$100 or more.

205. New subsection 559(3B) confers on the Minister the power to make an instrument that determines the method for calculating interest payable to former employees in these circumstances. In the event that the method requires adjustment, it is intended that the Minister will be permitted to revoke, amend or replace the instrument pursuant to subsection 33(3) of the *Acts Interpretation Act 1901*.

206. The instrument may prescribe different rates for different periods over which interest accrues (new subsection 559(3C)).

207. The instrument will be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**Item 80 – Subsection 559(4)**

208. Item 80 amends subsection 559(4) so that it preserves the appropriation of the Consolidated Revenue Fund for subsection 559(3) and does not expand that appropriation.

## **SCHEDULE 2 – APPLICATION AND TRANSITIONAL PROVISIONS**

209. Schedule 2 inserts a new Schedule 5 at the end of the Fair Work Act to make application and transitional provisions.

### ***Fair Work Act 2009***

#### **Item 1 – At the end of the Act**

210. This item inserts a new schedule in the Fair Work Act (Schedule 5).

#### **New item 1 – Definition**

211. This item defines *amending Act* for the purpose of new Schedule 5.

#### **New item 2 – Part 1 of Schedule 1 to the amending Act**

212. New item 2 of new Schedule 5 provides that the amendment made by Part 1 of Schedule 1 to the amending Act applies in relation to a request made after the commencement of that Part.

#### **New item 3 – Part 2 of Schedule 1 to the amending Act**

213. New item 3 of new Schedule 5 provides for these amendments to apply in relation to the end of the employment of an employee, if the end of the employment occurs after the commencement of Part 2 of Schedule 1 to the amending Act.

#### **New item 4 – Part 3 of Schedule 1 to the amending Act**

214. New item 4 of new Schedule 5 provides for this amendment to apply in relation to a compensation period beginning after the commencement of Part 3 of Schedule 1 to the amending Act.

#### **New item 5 – Division 1 of Part 4 of Schedule 1 to the amending Act**

215. This item provides that new paragraph 144(4)(ca) (inserted by item 6) applies to modern awards in operation after the commencement of Division 1 of Part 4 of Schedule 1 to the amending Act whether or not the award was made before that time.

#### **New item 6 – FWC to vary certain modern awards—genuine needs statement**

216. This item requires the FWC to make a determination varying existing modern award flexibility terms to comply with new paragraph 144(4)(ca) (inserted by item 6). This determination takes effect from the commencement of Division 1 of Part 4 of Schedule 1 to the amending Act.

#### **New item 7 – Division 2 of Part 4 of Schedule 1 to the amending Act**

217. This item provides that new section 145AA (inserted by item 10) applies in relation to an individual flexibility arrangement made after the commencement of Division 2 of Part 4 of Schedule 1 to the amending Act.



**New item 8 – Division 3 of Part 4 of Schedule 1 to the amending Act**

218. This item provides that the amendments made to subsections 203(2) and (6), and section 204 (inserted by items 11, 12 15, 16 and 17), and new subsection 203(4A) (inserted by item 14) apply in relation to enterprise agreements made after the commencement of Division 3 of Part 4 of Schedule 1 to the amending Act.

219. It also provides that new section 204A (inserted by item 18) applies in relation to an individual flexibility arrangement made after the commencement of Division 3 of Part 4 of Schedule 1 to the amending Act.

**New item 9 – Part 5 of Schedule 1 to the amending Act**

220. This item provides that the amendments made by Part 5 of Schedule 1 applies in relation to bargaining for a proposed single-enterprise greenfields agreement if an employer agrees to bargain for the proposed agreement after the commencement of that Part.

**New item 10 – Part 6 of Schedule 1 to the amending Act**

221. Subsection (1) of this item provides that new subsection 311(1A) (inserted by item 54) applies to an employee who becomes employed by a new employer (for the purposes of that employee) after the commencement of Part 6 of Schedule 1 to the amending Act.

222. Subsection (2) of this item provides that new subsections 768AD(5) and (6) (inserted by item 55) apply to a person who becomes employed by a new employer for the purposes of that employee) after the commencement of Part 6 of Schedule 1 to the amending Act.

**New item 11 – Part 7 of Schedule 1 to the amending Act**

223. New item 11 of Schedule 5 provides that the amendment of section 437 made by Part 7 of Schedule 1 to the amending Act will apply to applications for protected action ballot orders made after the commencement of that Part.

**New item 12 – Part 8 of Schedule 1 to the amending Act**

224. New subitem 12(1) of new Schedule 5 provides for this amendment to apply in relation to interviews conducted, and discussions held, after the commencement of item 62.

225. New subitem 12(2) of new Schedule 5 provides for this amendment to apply in relation to a dispute if the FWC commences dealing with the dispute:

- on its own initiative after the commencement of Part 8 of Schedule 1 to the amending Act; or
- on application made after the commencement of Part 8 of Schedule 1 to the amending Act.

**New item 13 – Part 9 of Schedule 1 to the amending Act**

226. This item provides that the amendments made by Part 9 of Schedule 1 to the amending Act apply in relation to an application for an order under Division 4 of Part 3-2 (remedies for unfair dismissal) if the application was made after the commencement of that Part. 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.

**New item 14 – Part 10 of Schedule 1 to the amending Act**

227. New item 14 provides that new paragraph 559(3A)(c) (inserted by item 79) applies in relation to an amount that was paid to the Commonwealth under subsection 559(1) after the commencement of Part 10 of Schedule 1 to the amending Act.

2013-2014

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

*Presented and read a first time*

## **Fair Work Amendment Bill 2014**

**No.     , 2014**

*(Employment)*

**A Bill for an Act to amend the *Fair Work Act 2009*,  
and for other purposes**





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1     **A Bill for an Act to amend the *Fair Work Act 2009*,**  
2     **and for other purposes**

3     The Parliament of Australia enacts:

4     **1 Short title**

5             This Act may be cited as the *Fair Work Amendment Act 2014*.

6     **2 Commencement**

7             (1) Each provision of this Act specified in column 1 of the table  
8                 commences, or is taken to have commenced, in accordance with  
9                 column 2 of the table. Any other statement in column 2 has effect  
10                according to its terms.

11

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1, Parts 1, 2 and 3	The day after this Act receives the Royal Assent.	
3. Schedule 1, Part 4, Division 1	The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent.	
4. Schedule 1, Part 4, Divisions 2 and 3	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
5. Schedule 1, Parts 5, 6 and 7	The day after this Act receives the Royal Assent.	
6. Schedule 1, Part 8	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
7. Schedule 1, Part 9	The day after this Act receives the Royal Assent.	
8. Schedule 1, Part 10	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
9. Schedule 2	The day after this Act receives the Royal Assent.	



1                   Note:       This table relates only to the provisions of this Act as originally  
2                                enacted. It will not be amended to deal with any later amendments of  
3                                this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

7      **3 Schedule(s)**

8 Each Act that is specified in a Schedule to this Act is amended or  
9 repealed as set out in the applicable items in the Schedule  
10 concerned, and any other item in a Schedule to this Act has effect  
11 according to its terms.

1     **Schedule 1—Amendments**

2     **Part 1—Extension of period of unpaid parental leave**

3     *Fair Work Act 2009*

4     **1 After subsection 76(5)**

5         Insert:

6             *Discussion*

7             (5A) The employer must not refuse the request unless the employer has  
8                 given the employee a reasonable opportunity to discuss the request.

1     **Part 2—Payment for annual leave**

2     ***Fair Work Act 2009***

3     **2 Subsection 55(4) (paragraph (b) of note 2)**

4         Omit “99).”, substitute “99); or”.

5     **3 Subsection 55(4) (at the end of note 2)**

6         Add:

- 7                     (c) that provide that if, when the employment of an employee ends,  
8                     the employee has a period of untaken paid annual leave, the  
9                     employee is to be paid the amount that would have been payable  
10                    to the employee had the employee taken that period of leave (that  
11                    amount may be higher than the amount required by  
12                    subsection 90(2)).

13    **4 Subsection 90(2)**

14         Repeal the subsection, substitute:

- 15         (2) If, at the time (the *termination time*) when the employment of an  
16         employee ends, the employee has a period of untaken paid annual  
17         leave:  
18             (a) the employer must pay the employee a rate for each hour of  
19             the employee’s untaken paid annual leave; and  
20             (b) that rate must not be less than the rate that, immediately  
21             before the termination time, is the employee’s base rate of  
22             pay (expressed as an hourly rate).

23         Note:       See also section 55 (which deals with the interaction between the  
24                       National Employment Standards and a modern award or enterprise  
25                       agreement).

1     **Part 3—Taking or accruing leave while receiving**  
2                     **workers' compensation**

3     *Fair Work Act 2009*

4     **5 Subsection 130(2)**

5             Repeal the subsection.

**Part 4—Individual flexibility arrangements**

**Division 1—Modern awards (genuine needs statements)**

*Fair Work Act 2009*

**6 After paragraph 144(4)(c)**

Insert:

- (ca) require the employer to ensure that any individual flexibility arrangement includes a statement by the employee setting out why the employee believes (at the time of agreeing to the arrangement) that the arrangement:
  - (i) meets the genuine needs of the employee; and
  - (ii) results in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to; and

**Division 2—Modern awards (other matters)**

*Fair Work Act 2009*

**7 Paragraph 144(4)(d)**

Repeal the paragraph, substitute:

- (d) require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:
  - (i) by either the employee, or the employer, giving 13 weeks notice of termination, in writing, to the other party to the arrangement; or
  - (ii) by the employee and the employer at any time if they agree, in writing, to the termination; and

**8 At the end of subsection 144(4)**

Add:

- Note: Benefits other than an entitlement to a payment of money may be taken into account for the purposes of paragraph (c).

**9 At the end of subsection 145(3)**

Add:

Note: An employer does not contravene a flexibility term in the circumstances set out in section 145AA.

**10 After section 145**

Insert:

**145AA Contravention of flexibility term by employer**

An employer does not contravene a flexibility term of a modern award in relation to a particular individual flexibility arrangement if, at the time when the arrangement is made, the employer reasonably believes that the requirements of the term were complied with, so far as the requirements are applicable to the arrangement.

**Division 3—Enterprise agreements**

***Fair Work Act 2009***

**11 Before paragraph 203(2)(a)**

Insert:

(aa) if the enterprise agreement includes terms that deal with one or more of the following matters:

- (i) arrangements about when work is performed;
- (ii) overtime rates;
- (iii) penalty rates;
- (iv) allowances;
- (v) leave loading;

provide that the effect of those terms may be varied by an individual flexibility arrangement agreed to under the flexibility term; and

**12 Paragraph 203(2)(a)**

Omit “the terms”, substitute “any other terms”.

1 **13 At the end of subsection 203(4)**

2 Add:

3 Note: Benefits other than an entitlement to a payment of money may be  
4 taken into account for the purposes of this subsection.

5 **14 After subsection 203(4)**

6 Insert:

7 *Requirement for genuine needs statement*

8 (4A) The flexibility term must require the employer to ensure that any  
9 individual flexibility arrangement agreed to under the term  
10 includes a statement by the employee setting out why the employee  
11 believes (at the time of agreeing to the arrangement) that the  
12 arrangement:

- 13 (a) meets the genuine needs of the employee; and  
14 (b) results in the employee being better off overall than the  
15 employee would have been if no individual flexibility  
16 arrangement were agreed to.

17 **15 Paragraph 203(6)(a)**

18 Omit “written notice of not more than 28 days”, substitute “13 weeks  
19 notice of termination, in writing, to the other party to the arrangement”.

20 **16 At the end of subsection 204(3)**

21 Add:

22 Note: An employer does not contravene a flexibility term in the  
23 circumstances set out in section 204A.

24 **17 Subsection 204(4)**

25 Repeal the subsection, substitute:

26 *Arrangement may be terminated by agreement or notice*

27 (4) The flexibility term is taken to provide (in addition to any other  
28 means of termination of the arrangement that the term provides)  
29 that the arrangement can be terminated:

- 30 (a) by either the employee, or the employer, giving written  
31 notice of not more than 28 days; or

1 (b) by the employee and the employer at any time if they agree,  
2 in writing, to the termination.

3 **18 After section 204**

4 Insert:

5 **204A Contravention of flexibility term by employer**

6 An employer does not contravene a flexibility term of an enterprise  
7 agreement in relation to a particular individual flexibility  
8 arrangement if, at the time when the arrangement is made, the  
9 employer reasonably believes that the requirements of the term  
10 were complied with, so far as the requirements are applicable to the  
11 arrangement.



1 **Part 5—Greenfields agreements**

2 *Fair Work Act 2009*

3 **19 Section 12 (at the end of the definition of *appointment*)**

4 Add “or 177(c)”.

5 **20 Section 12 (definition of *bargaining representative*)**

6 Omit “section 176”, substitute “sections 176 and 177”.

7 **21 Section 12**

8 Insert:

9 *notified negotiation period* for a proposed single-enterprise  
10 agreement that is a greenfields agreement: see section 178B.

11 **22 Subsection 172(1) (note 2)**

12 After “enterprise agreement”, insert “that is not a greenfields  
13 agreement”.

14 **23 After section 176**

15 Insert:

16 **177 Bargaining representatives for proposed enterprise agreements**  
17 **that are greenfields agreements**

18 The following paragraphs set out the persons who are *bargaining*  
19 *representatives* for a proposed single-enterprise agreement that is a  
20 greenfields agreement:

- 21 (a) an employer that will be covered by the agreement;  
22 (b) an employee organisation:  
23 (i) that is entitled to represent the industrial interests of one  
24 or more of the employees who will be covered by the  
25 agreement, in relation to work to be performed under  
26 the agreement; and  
27 (ii) with which the employer agrees to bargain for the  
28 agreement;

- 1 (c) a person who is a bargaining representative of an employer  
2 that will be covered by the agreement if the employer  
3 appoints, in writing, the person as his or her bargaining  
4 representative for the agreement.

5 **24 At the end of subsection 178(2)**

- 6 Add:  
7 ; and (c) for an appointment made by an employer that will be covered  
8 by a proposed single-enterprise agreement that is a  
9 greenfields agreement—be given, on request, to an employee  
10 organisation that is a bargaining representative for the  
11 agreement.

12 **25 Paragraph 178A(3)(b)**

- 13 After “a proposed enterprise agreement”, insert “, other than a  
14 single-enterprise agreement that is a greenfields agreement”.

15 **26 After subsection 178A(3)**

- 16 Insert:  
17 (3A) A copy of an instrument under subsection (1) made by an employer  
18 that will be covered by a proposed single-enterprise agreement that  
19 is a greenfields agreement must be given to the bargaining  
20 representative and, on request, to an employee organisation that is  
21 a bargaining representative for the agreement.

22 **27 At the end of Division 3 of Part 2-4**

- 23 Add:

24 **178B Notified negotiation period for a proposed single-enterprise**  
25 **agreement that is a greenfields agreement**

- 26 (1) If a proposed single-enterprise agreement is a greenfields  
27 agreement, an employer that is a bargaining representative for the  
28 agreement may give written notice:  
29 (a) to each employee organisation that is a bargaining  
30 representative for the agreement; and  
31 (b) stating that the period of 3 months beginning on a specified  
32 day is the *notified negotiation period* for the agreement.  
33 (2) The specified day must be later than:
-

- 1 (a) if only one employee organisation is a bargaining  
2 representative for the agreement—the day on which the  
3 employer gave the notice to the organisation; or  
4 (b) if 2 or more employee organisations are bargaining  
5 representatives for the agreement—the last day on which the  
6 employer gave the notice to any of those organisations.

7 *Multiple employers—agreement to giving of notice*

- 8 (3) If 2 or more employers are bargaining representatives for the  
9 agreement, the notice has no effect unless the other employer or  
10 employers agree to the giving of the notice.

11 **28 At the end of section 182**

12 Add:

- 13 (4) If:  
14 (a) a proposed single-enterprise agreement is a greenfields  
15 agreement that has not been made under subsection (3); and  
16 (b) there has been a notified negotiation period for the  
17 agreement; and  
18 (c) the notified negotiation period has ended; and  
19 (d) the employer or employers that were bargaining  
20 representatives for the agreement (the ***relevant employer or***  
21 ***employers***) gave each of the employee organisations that  
22 were bargaining representatives for the agreement a  
23 reasonable opportunity to sign the agreement; and  
24 (e) the relevant employer or employers apply to the FWC for  
25 approval of the agreement;  
26 the agreement is taken to have been ***made***:  
27 (f) by the relevant employer or employers with each of the  
28 employee organisations that were bargaining representatives  
29 for the agreement; and  
30 (g) when the application is made to the FWC for approval of the  
31 agreement.

32 Note: See also section 185A (material that must accompany an application).

33 **29 Subsection 185(1A)**

34 After “the agreement is a”, insert “multi-enterprise agreement that is a”.

1     **30 At the end of section 185**

2             Add:

3                     *Single-enterprise agreements that are greenfields agreements*

- 4             (6) This section does not apply to an agreement made under  
5                 subsection 182(4).

6     **31 At the end of Subdivision A of Division 4 of Part 2-4**

7             Add:

8     **185A Material that must accompany an application under**  
9             **subsection 182(4) for approval of a greenfields agreement**

10             An application under subsection 182(4) for approval of an  
11             agreement must be accompanied by:

- 12                 (a) a copy of the agreement; and  
13                 (b) any declarations that are required by the procedural rules to  
14                 accompany the application.

15     **32 Subsection 186(1)**

16             After “made under”, insert “subsection 182(4) or”.

17     **33 At the end of section 187**

18             Add:

- 19             (6) If an agreement is made under subsection 182(4) (which deals with  
20                 a single-enterprise agreement that is a greenfields agreement), the  
21                 FWC must be satisfied that the agreement, considered on an  
22                 overall basis, provides for pay and conditions that are consistent  
23                 with the prevailing pay and conditions within the relevant industry  
24                 for equivalent work.

25             Note:         In considering the prevailing pay and conditions within the relevant  
26                             industry for equivalent work, the FWC may have regard to the  
27                             prevailing pay and conditions in the relevant geographical area.

28     **34 Paragraph 190(1)(a)**

29             After “made under”, insert “subsection 182(4) or”.

**35 Subsection 192(1)**

After “made under”, insert “subsection 182(4) or”.

**36 Subsection 193(6)**

After “made under”, insert “subsection 182(4) or”.

**37 After subsection 201(2)**

Insert:

(2A) If:

(a) an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement); and

(b) the FWC approves the agreement;  
the FWC must note in its decision to approve the agreement that the agreement covers each employee organisation that was a bargaining representative for the agreement.

**38 Paragraph 211(1)(a)**

After “made under”, insert “subsection 182(4) or”.

**39 Paragraph 211(4)(d)**

After “(6) to”, insert “subsection 182(4) or”.

**40 At the end of subsection 228(1)**

Add:

Note: See also section 255A (limitations relating to greenfields agreements).

**41 At the end of subsection 229(1)**

Add:

Note: See also section 255A (limitations relating to greenfields agreements).

**42 At the end of subsection 230(1)**

Add:

Note: See also section 255A (limitations relating to greenfields agreements).

**43 At the end of section 232**

Add:

1                               Note:       See also section 255A (limitations relating to greenfields agreements).

2       **44 Section 234 (note)**

3                               After “Note”, insert “1”.

4       **45 At the end of section 234**

5                               Add:

6                               Note 2:     See also section 255A (limitations relating to greenfields agreements).

7       **46 At the end of subsection 235(1)**

8                               Add:

9                               Note:       See also section 255A (limitations relating to greenfields agreements).

10      **47 Subsection 238(1)**

11                             After “a proposed single-enterprise agreement”, insert “(other than a  
12                             greenfields agreement)”.

13      **48 At the end of subsection 240(1)**

14                             Add:

15                             Note:       See also section 255A (limitations relating to greenfields agreements).

16      **49 At the end of subsection 255(1)**

17                             Add:

18                               ; or (d) an employer to give a notice under section 178B; or

19                               (e) an employer to specify a particular day in a notice under  
20                               section 178B; or

21                               (f) an employer to agree to the giving of a notice under  
22                               section 178B.

23      **50 After section 255**

24                             Insert:

25      **255A Limitations relating to greenfields agreements**

26                             (1) If:

27                               (a) a proposed single-enterprise agreement is a greenfields  
28                               agreement; and

- 1 (b) there has been a notified negotiation period for the  
2 agreement; and  
3 (c) the notified negotiation period has ended;  
4 then:  
5 (d) the following provisions do not apply in relation to the  
6 agreement at any time after the end of the notified  
7 negotiation period:  
8 (i) section 228 (which deals with good faith bargaining  
9 requirements);  
10 (ii) sections 229 and 230 (which deal with bargaining  
11 orders);  
12 (iii) sections 234 and 235 (which deal with serious breach  
13 declarations);  
14 (iv) section 240 (which deals with bargaining disputes); and  
15 (e) a bargaining order that relates to the agreement ceases to  
16 have effect at the end of the notified negotiation period.
- 17 (2) Paragraph (1)(e) has effect despite anything in section 232 (which  
18 deals with the operation of bargaining orders).

19 **51 At the end of subsection 269(1)**

20 Add:

21 Note 3: See also section 271A (limitations relating to greenfields agreements).

22 **52 At the end of Division 4 of Part 2-5**

23 Add:

24 **271A Limitations relating to greenfields agreements**

25 If:

- 26 (a) a proposed single-enterprise agreement is a greenfields  
27 agreement; and  
28 (b) there has been a notified negotiation period for the  
29 agreement; and  
30 (c) the notified negotiation period has ended;  
31 section 269 (which deals with bargaining related workplace  
32 determinations) does not apply in relation to the agreement at any  
33 time after the end of the notified negotiation period.

**Part 6—Transfer of business**

***Fair Work Act 2009***

**53 Section 12 (paragraph (a) of the definition of *transfer of business*)**

Omit “subsection 311(1)”, substitute “subsections 311(1) and (1A)”.

**54 After subsection 311(1)**

Insert:

(1A) However, there is not a *transfer of business* if:

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

**55 At the end of section 768AD**

Add:

*Exception*

(5) Subsections (2), (3) and (4) do not apply if:

- (a) the new employer is an associated entity of the old State employer when the person becomes employed by the new employer as mentioned in paragraph (1)(b); and
- (b) before the termination of the person’s employment with the old State employer, the person sought to become employed by the new employer at the person’s initiative.

(6) For the purposes of sections 768BL, 768BM and 768BN, assume that subsection (5) of this section had not been enacted.



**Part 7—Protected action ballot orders**

***Fair Work Act 2009***

**56 After subsection 437(2)**

Insert:

(2A) Subsection (1) does not apply unless there has been a notification time in relation to the proposed enterprise agreement.

Note: For ***notification time***, see subsection 173(2). Protected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute).

**Part 8—Right of entry**

***Fair Work Act 2009***

**57 Section 12 (definition of *accommodation arrangement*)**

Repeal the definition.

**58 Section 12**

Insert:

*invitation certificate*: see subsection 520A(1).

**59 Section 12 (definition of *transport arrangement*)**

Repeal the definition.

**60 Section 478**

Omit:

Division 7 deals with accommodation and transport arrangements in remote areas.
---

**61 Section 484**

Repeal the section, substitute:

**484 Entry to hold discussions**

*Permit holder's organisation is covered by an enterprise agreement*

- (1) A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:
- (a) who perform work on the premises; and
  - (b) whose industrial interests the permit holder's organisation is entitled to represent; and
  - (c) who wish to participate in those discussions;
- if:

(d) an enterprise agreement applies to work performed on the premises; and

(e) the permit holder's organisation is covered by the enterprise agreement.

Note 1: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 2: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

Note 3: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold the relevant discussions on the premises.

*Permit holder's organisation is not covered by an enterprise agreement*

(2) A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:

(a) who perform work on the premises; and

(b) whose industrial interests the permit holder's organisation is entitled to represent; and

(c) who wish to participate in those discussions;

if:

(d) either:

(i) an enterprise agreement applies to work performed on the premises, but the enterprise agreement does not cover the permit holder's organisation; or

(ii) no enterprise agreement applies to work performed on the premises; and

(e) a member, or prospective member, of the permit holder's organisation:

(i) who performs work on the premises; and

(ii) whose industrial interests the organisation is entitled to represent;

has invited the organisation to send a representative to the premises for the purposes of holding those discussions.

Note 1: The FWC may issue an invitation certificate under section 520A. The certificate will state that the FWC is satisfied that the organisation has been invited.

Note 4: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold the relevant discussions on the premises.

Repeal the sections, substitute:

- (iii) making it difficult for persons to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason.

1 (3) However, a request under subsection (1) is not unreasonable only  
2 because the room, area or route is not that which the permit holder  
3 would have chosen.

4 (4) The regulations may prescribe circumstances in which a request  
5 under subsection (1) is or is not reasonable.

6 **63 Subsection 505(1)**

7 Repeal the subsection, substitute:

8 (1) The FWC may deal with a dispute about the operation of this Part  
9 (including a dispute about whether a request under section 491,  
10 492 or 499 is reasonable).

11 Note: Sections 491, 492 and 499 deal with requests for permit holders to use  
12 particular rooms or areas, and comply with occupational health and  
13 safety requirements.

14 **64 Subsection 505(5)**

15 Repeal the subsection, substitute:

16 (5) In dealing with the dispute, the FWC must not confer rights on a  
17 permit holder that are additional to, or inconsistent with, rights  
18 exercisable in accordance with Division 2 or 3 of this Part, unless  
19 the dispute is about whether a request under section 491, 492 or  
20 499 is reasonable.

21 **65 Subsection 505A(4)**

22 Repeal the subsection.

23 **66 Subsection 505A(6)**

24 Repeal the subsection, substitute:

25 (6) In dealing with the dispute, the FWC must take into account:  
26 (a) fairness between the parties concerned; and  
27 (b) if the dispute relates to an employer—the combined impact  
28 on the employer’s operations of entries onto the premises by  
29 permit holders of organisations; and  
30 (c) if the dispute relates to an occupier of premises—the  
31 combined impact on the occupier’s operations of entries onto  
32 the premises by permit holders of organisations.

- 1 (7) For the purposes of paragraphs (6)(b) and (c), it is immaterial  
2 whether the organisations, or their permit holders, are parties to the  
3 dispute.

4 **67 After Subdivision D of Division 6 of Part 3-4**

5 Insert:

6 **Subdivision DA—Invitation certificates**

7 **520A Invitation certificates**

- 8 (1) The FWC must, on application by an organisation, issue a  
9 certificate (an *invitation certificate*) to the organisation if the FWC  
10 is satisfied that:  
11 (a) a member, or prospective member, of the organisation  
12 performs work on particular premises; and  
13 (b) the organisation is entitled to represent the industrial interests  
14 of the member or prospective member; and  
15 (c) the member or prospective member has invited the  
16 organisation to send a representative to the premises for the  
17 purposes of holding discussions with one or more employees  
18 or TCF award workers.
- 19 (2) An invitation certificate must state the following:  
20 (a) the premises to which it relates;  
21 (b) the organisation to which it relates;  
22 (c) that the FWC is satisfied of the matters referred to in  
23 paragraphs (1)(a), (b) and (c).
- 24 (3) The FWC must specify an expiry date in an invitation certificate.  
25 The certificate ceases to have effect at the end of that date.
- 26 (4) In specifying an expiry date in an invitation certificate, the FWC  
27 must comply with any limitations, restrictions or requirements  
28 prescribed by the regulations.
- 29 (5) An invitation certificate must not reveal the identity of the member  
30 or prospective member to whom it relates.

1     **68 Paragraphs 521(a), (b), (c) and (d)**

2             Omit “and affected member certificates”, substitute “, affected member  
3             certificates and invitation certificates”.

4     **69 Division 7 of Part 3-4**

5             Repeal the Division.

6     **70 Subsection 539(2) (cell at table item 25, column headed**  
7             **“Civil remedy provision”)**

8             Omit:

9             521C(3)

10            521D(3)

11    **71 After paragraph 601(5)(f)**

12            Insert:

13               (fa) a decision to issue, or to refuse to issue, an invitation  
14               certificate under section 520A;

**Part 9—FWC hearings and conferences**

***Fair Work Act 2009***

**72 Section 12**

Insert:

***designated application-dismissal power*** means:

- (a) the power conferred by section 399A (which deals with dismissing applications for orders under Division 4 of Part 3-2); or
- (b) the power conferred by section 587 to dismiss an application for an order under Division 4 of Part 3-2.

Note: Division 4 of Part 3-2 deals with remedies for unfair dismissal of employees.

**73 Section 397**

Before “The FWC”, insert “(1)”.

**74 At the end of section 397**

Add:

- (2) This section does not apply for the purposes of deciding whether to exercise a designated application-dismissal power.

**75 At the end of section 399**

Add:

***Designated application-dismissal power***

- (4) To avoid doubt, a reference in this section to a ***hearing in relation to a matter arising under this Part*** includes a reference to a hearing for the purposes of deciding whether to exercise a designated application-dismissal power.

**76 After section 399A**

Insert:



**399B Hearings and conferences—dismissing applications**

- (1) If the FWC decides not to hold a hearing, or conduct a conference, for the purposes of deciding whether to exercise a designated application-dismissal power, the FWC must, before deciding whether to exercise the power:
- (a) invite the parties to the matter concerned to provide further information that relates to whether the power should be exercised; and
  - (b) take account of any such information.
- (2) If, as a result of information provided as mentioned in subsection (1), the FWC considers that it would be desirable to hold a hearing, or conduct a conference, for the purposes of deciding whether to exercise a designated application-dismissal power, the FWC may do so.
- (3) An invitation under paragraph (1)(a) must:
- (a) be given by written notice to the parties to the matter concerned; and
  - (b) specify the time by which the information referred to in the invitation is to be provided.

**77 Subsection 587(1) (note)**

After “Note”, insert “1”.

**78 At the end of subsection 587(1)**

Add:

- Note 2: Section 399 deals with hearings for the purposes of deciding whether to exercise the power conferred by this section to dismiss an application for an order under Division 4 of Part 3-2.
- Note 3: Section 399B sets out requirements that apply if the FWC decides not to hold a hearing, or conduct a conference, for the purposes of deciding whether to exercise the power conferred by this section to dismiss an application for an order under Division 4 of Part 3-2.

**Part 10—Unclaimed money**

***Fair Work Act 2009***

**79 Before subsection 559(4)**

Insert:

*Interest*

(3A) If:

(a) an amount is paid to a person under subsection (3) at a particular time; and

(b) the amount is at least \$100; and

(c) the amount is attributable to an amount that was paid to the Commonwealth under subsection (1) more than 6 months before that time;

the Fair Work Ombudsman, on behalf of the Commonwealth, must also pay to the person the amount of interest (if any) worked out in accordance with an instrument under subsection (3B).

(3B) The Minister may make an instrument for the purposes of subsection (3A).

(3C) An instrument under subsection (3B) may involve different rates of interest for different periods over which the interest accrues. For this purpose, *rate* includes a nil rate.

(3D) An instrument made under subsection (3B) is a legislative instrument.

**80 Subsection 559(4)**

Omit “this section”, substitute “subsection (3)”.

1 **Schedule 2—Application and transitional**  
2 **provisions**  
3

4 ***Fair Work Act 2009***

5 **1 At the end of the Act**

6 Add:

7 **Schedule 5—Amendments made by the Fair**  
8 **Work Amendment Act 2014**

9 Note: See section 795A.  
10  
11

12 **1 Definition**

13 In this Schedule:

14 ***amending Act*** means the *Fair Work Amendment Act 2014*.

15 **2 Part 1 of Schedule 1 to the amending Act**

16 The amendment made by Part 1 of Schedule 1 to the amending Act  
17 applies in relation to a request made after the commencement of  
18 that Part.

19 **3 Part 2 of Schedule 1 to the amending Act**

20 The amendments made by Part 2 of Schedule 1 to the amending  
21 Act apply in relation to the end of the employment of an employee,  
22 if the end of the employment occurs after the commencement of  
23 that Part.

24 **4 Part 3 of Schedule 1 to the amending Act**

25 The amendment made by Part 3 of Schedule 1 to the amending Act  
26 applies in relation to a compensation period beginning after the  
27 commencement of that Part.

**5 Division 1 of Part 4 of Schedule 1 to the amending Act**

Paragraph 144(4)(ca) applies in relation to a modern award that is in operation after the commencement of Division 1 of Part 4 of Schedule 1 to the amending Act, whether or not the award was made before the commencement of that Division.

**6 FWC to vary certain modern awards—genuine needs statement**

*Scope*

- (1) This clause applies in relation to a modern award if:
- (a) the award is in operation at any time during the period of 6 months ending at the commencement of Division 1 of Part 4 of Schedule 1 to the amending Act; and
  - (b) at any time during that 6-month period, the award includes a flexibility term that does not comply with paragraph 144(4)(ca) (if it were assumed that paragraph 144(4)(ca) applied in relation to the award).

*Variation*

- (2) The FWC must, before the commencement of Division 1 of Part 4 of Schedule 1 to the amending Act, make a determination varying the modern award so as to ensure that the flexibility term complies with paragraph 144(4)(ca).
- (3) A determination made under subclause (2) comes into operation at (and takes effect from) the commencement of Division 1 of Part 4 of Schedule 1 to the amending Act.
- (4) Section 168 applies to a determination made under subclause (2) as if it were a determination made under Part 2-3.

**7 Division 2 of Part 4 of Schedule 1 to the amending Act**

Section 145AA applies in relation to an individual flexibility arrangement made after the commencement of Division 2 of Part 4 of Schedule 1 to the amending Act.

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**8 Division 3 of Part 4 of Schedule 1 to the amending Act**

- (1) The amendments of subsections 203(2) and (6) made by Division 3 of Part 4 of Schedule 1 to the amending Act apply in relation to an enterprise agreement made after the commencement of that Division.
- (2) Subsection 203(4A) applies in relation to an enterprise agreement made after the commencement of Division 3 of Part 4 of Schedule 1 to the amending Act.
- (3) The amendment of section 204 made by Division 3 of Part 4 of Schedule 1 to the amending Act applies in relation to an enterprise agreement made after the commencement of that Division.
- (4) Section 204A applies in relation to an individual flexibility arrangement made after the commencement of Division 3 of Part 4 of Schedule 1 to the amending Act.

**9 Part 5 of Schedule 1 to the amending Act**

The amendments made by Part 5 of Schedule 1 to the amending Act, so far as they concern proposed enterprise agreements, apply in relation to a proposed enterprise agreement if an employer agrees to bargain for the proposed enterprise agreement after the commencement of that Part.

**10 Part 6 of Schedule 1 to the amending Act**

- (1) Subsection 311(1A) applies in relation to an employee who becomes employed by a new employer after the commencement of Part 6 of Schedule 1 to the amending Act.
- (2) Subsections 768AD(5) and (6) apply in relation to a person who becomes employed by a new employer after the commencement of Part 6 of Schedule 1 to the amending Act.

**11 Part 7 of Schedule 1 to the amending Act**

The amendment of section 437 made by Part 7 of Schedule 1 to the amending Act applies in relation to an application made under that section, if the application was made after the commencement of that Part.

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**12 Part 8 of Schedule 1 to the amending Act**

- (1) The amendments made by item 62 of Schedule 1 to the amending Act apply in relation to interviews conducted, and discussions held, after the commencement of that item.
- (2) The amendments of section 505A made by Part 8 of Schedule 1 to the amending Act apply to a dispute if the FWC commences to deal with the dispute:
- (a) on its own initiative after the commencement of that Part; or
  - (b) on application made after the commencement of that Part.

**13 Part 9 of Schedule 1 to the amending Act**

The amendments made by Part 9 of Schedule 1 to the amending Act apply in relation to an application for an order under Division 4 of Part 3-2, if the application was made after the commencement of Part 9 of Schedule 1 to the amending Act.

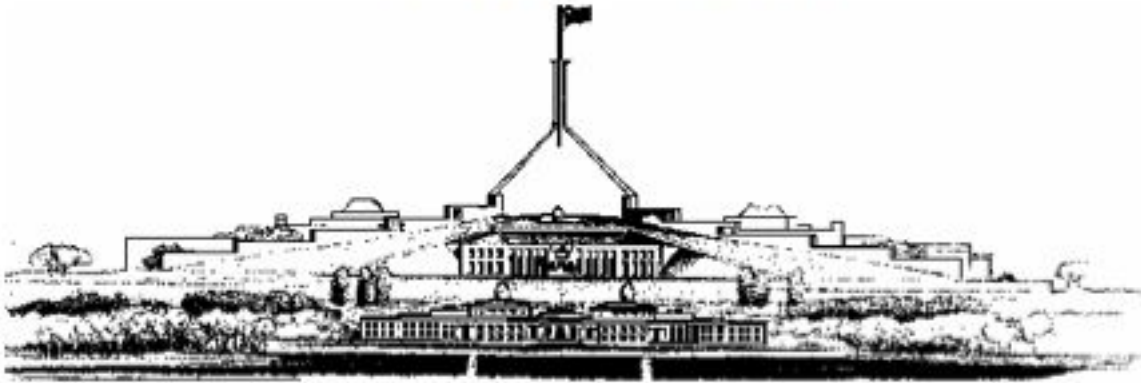
**14 Part 10 of Schedule 1 to the amending Act**

Paragraph 559(3A)(c) applies in relation to an amount that was paid to the Commonwealth under subsection 559(1) after the commencement of Part 10 of Schedule 1 to the amending Act.



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



**HOUSE OF REPRESENTATIVES**

**PROOF**

**BILLS**

**Fair Work Amendment Bill 2014**

**Second Reading**

**SPEECH**

**Thursday, 27 February 2014**

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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# SPEECH

**Date** Thursday, 27 February 2014  
**Page** 4  
**Questioner**  
**Speaker** Pyne, Christopher, MP

**Source** House  
**Proof** Yes  
**Responder**  
**Question No.**

**Mr PYNE** (Sturt—Leader of the House and Minister for Education) (09:19): I move:

That this bill be now read a second time.

Only a common-sense and practical approach to workplace relations can protect people's jobs and income, and encourage an environment for productive and innovative business. That is the approach this government promised in our *Policy to Improve the Fair Work Laws*, released in May last year. Our policy will help make Australian workplaces even better, by improving the Fair Work laws to provide a stable, fair and prosperous future for all. The coalition's workplace relations reforms will restore the balance back to the sensible centre. This has already begun through the introduction of the Fair Work (Registered Organisations) Amendment Bill 2013 and the Building and Construction Industry (Improving Productivity) Bill 2013.

This bill will deliver on key aspects of our election policy and does not go any further. Indeed, on union workplace access, individual flexibility arrangements and the removal of the ability to strike first and talk later, we are delivering on specific policy commitments made by the Labor Party prior to the 2007 election but which Labor deliberately broke.

Through our Fair Work Amendment Bill 2014, we are giving effect to a number of commitments in our policy and further restoring balance to the system. We will do this by:

improving the process for the negotiation of greenfields agreements, to ensure that unions can no longer frustrate bargaining for these agreements through unsustainable claims and delays, which can threaten investment and delay the commencement of major new projects that are crucial to our prosperity;

restoring union workplace access rules reflecting those in place prior to Labor's unbalanced amendments and dealing with excessive right-of-entry visits by union officials;

improving workplace productivity and flexibility by enhancing the scope for employees to make individual flexibility arrangements that meet their genuine needs, as determined by those employees;

closing the 'strike first, talk later' loophole in the good faith bargaining rules, which Labor refused to address; and

maintaining the value of unclaimed wages recovered for workers by the Commonwealth. This bill also enacts a number of recommendations from the Fair Work Review Panel in its 2012 report commissioned by the now Leader of the Opposition, the member for Maribyrnong.

## Union workplace access

The Fair Work Amendment Bill will address the current imbalance in union workplace access rules. Our changes will fairly and sensibly balance the right of employees to be represented in the workplace if they wish to be, with the right of employers to go about their business without unnecessary disruption.

The government sees right of entry as a specific statutory privilege to which conditions ought to apply. Regrettably, some union bosses do not.

In 2007, the Labor Party promised on multiple occasions that there would be no changes to the union right-of-entry laws. In a press conference on 28 August 2007, then deputy opposition leader Julia Gillard said:

We will make sure that current right of entry provisions stay. We understand that entering on the premises of an employer needs to happen in an orderly way. We will keep the right of entry provisions.

These promises were not kept and unions were given much easier access to workplaces under the Fair Work Act provisions which were exploited.

This has meant that many businesses face excessive workplace visits from unions even when their employees are not union members and have not asked for the union's presence. The problem has been exacerbated in some workplaces by unions competing to represent employees at the workplace.

The problem was highlighted by the former government's Fair Work Review Panel, which noted that the Pluto LNG Project received over 200 right-of-entry visits in only three months. BHP Billiton's Worsley Alumina plant faced 676 right of entry visits in a single year. Our changes will reduce the capacity



for unions to deliberately harass and disrupt businesses in this way.

A recent case featuring CFMEU National President Joe McDonald has underlined the urgent need for these reforms. In the most recent case, where Mr McDonald and the CFMEU were fined \$193,600, he ignored the request of an industrial relations consultant to leave a site owned by Citic Pacific's Sino Iron Ore in Western Australia. When asked by the consultant to leave the site because he didn't have a right-of-entry permit, Mr McDonald replied:

I haven't had one for seven years, and that hasn't f\*\*king stopped me.

Mr McDonald's attitude reflects the regrettable dark underbelly of the union movement that should have no place in modern and fair workplaces.

To be clear, these amendments will enact Labor's publicly stated promise prior to the 2007 election—a promise that was not honoured. Given that the Labor Party in opposition, with the strong support of the union movement, supported this 2007 policy platform we expect that these amendments will not be contentious. Most union officials will find these changes are not impacting their sensible approach to their right-of-entry activities.

### **Right of entry—e ligibility**

Currently, right of entry for discussion purposes can occur when the relevant union is entitled to represent the industrial interests of the employees at the workplace. This means unions can enter and hold discussions even if they have no actual members at that workplace and no-one has sought their presence.

The bill will amend the provisions so that the ability for unions to enter a workplace is either tied to a union's recognised representative role at the workplace, or employees at the workplace have requested the union's presence. A union will only be entitled to enter a workplace for discussion purposes if:

1. they are covered by an enterprise agreement, or
2. they have been invited by a member or employee they are entitled to represent.

If the employee who would like the union to come to their workplace wishes to remain anonymous, a union will be able to apply to the Fair Work Commission for an 'invitation certificate'. The Fair Work Commission must issue a certificate if it is satisfied that a worker who performs work on the premises and whom the union is entitled to represent has invited the union to the workplace to hold discussions. The certificate will not

identify the employee who has made the request. This will restore the balance in the right-of-entry regime so that it is similar to prior to the commencement of the Fair Work Act—consistent with the bipartisan consensus at the time of the 2007 election.

### **Right of entry—f requency disputes**

The bill will also provide an effective mechanism for the Fair Work Commission to deal with disputes about excessive right-of-entry visits for discussion purposes.

The previous government amendments to the Fair Work Act in this area were drafted in a way that renders them largely ineffective and only able to be used in extreme circumstances: where there has been an 'unreasonable diversion of the occupier's critical resources'.

These amendments will remove this restriction to ensure the commission has the power to properly deal with excessive right-of-entry visits—for example, by suspending, revoking or imposing conditions on an entry permit. Additionally, the amendments provide that the Fair Work Commission can take into account the combined impact of visits by all unions to the workplace, reflecting that in some circumstances an employer will be subject to visits by multiple unions.

### **Right of entry—r epeals**

The bill will also repeal the previous government's amendments, made in 2013, that expanded union right-of-entry rights even further by allowing for uninvited 'lunch-room invasions' and requiring employers to pay for the cost of 'union boss joyrides' to remote worksites. Those amendments give unions the right to insist on addressing workers in their lunch room, even when the workers have not requested their presence and are not union members. This is unfair to the 87 per cent of private sector workers who are not union members and for all workers who just want to eat their lunch in peace—and don't we all.

This bill will restore the sensible arrangements that were previously in place, whereby union officials must comply with a reasonable request by the employer to hold discussions in a particular room. Employers will continue to be prevented from nominating locations with the intention of intimidating, discouraging or hindering employees from participating in discussions.

The former government also introduced obligations on employers at remote worksites to provide union officials with transport and accommodation to enable them to access those sites. We will repeal this costly and onerous piece of regulation and instead reinstate the previous approach where unions and employers can reach their own arrangements in these circumstances.

## Greenfields agreements

Greenfields agreements can be vital for the commencement of major new projects, as investment funding is often contingent on settled labour arrangements being in place. The bill will ensure that these agreements are negotiated subject to good faith bargaining requirements and in a reasonable time frame. These amendments are another step to demonstrate that 'Australia is open for business'. They are essential if Australia is to encourage future investment in new resources projects.

The bill will remove the effective union veto power over greenfields agreements under the current arrangements that have enabled them to frustrate the making of these agreements by seeking exorbitant wages and conditions or refusing to agree at all. As the former government's Fair Work Review noted, in somewhat understated language, these practices 'potentially threaten future investment in major projects in Australia'. This is bad for jobs and bad for the economy.

The bill will extend good faith bargaining rules to the negotiation of greenfields agreements to improve standards of bargaining conduct. This will mean that employers and unions will be required to, for example, attend and participate in meetings with each other and consider and respond to proposals in a timely manner.

To ensure that greenfields agreements can be made in a timely manner, the bill will establish a new, optional three-month negotiation time frame. The three-month time frame will apply where appropriate notice is provided by an employer to the relevant union or unions. If agreement cannot be reached in this time frame, the employer will be able to take its proposed agreement to the Fair Work Commission for approval. The agreement will have to satisfy the existing approval requirements under the Fair Work Act, including the better off overall test. The agreement will also have to satisfy a new requirement that it provides for pay and conditions that are consistent with the prevailing standards within the relevant industry for equivalent work. Consistent with the existing framework, the Fair Work Commission must also be satisfied that the union or unions to be covered by the agreement are able to represent the majority of future employees.

The amendments to the greenfields provisions will help to unlock new investment and prevent needless delays to new projects. This will provide confidence and certainty to investors and ensure that Australia and Australians benefit from the prosperity generated by new projects.

These amendments will send a strong message to overseas investors that Australia is again open for business and that projects can get underway quickly.

## Fixing the 'strike first, talk later' loophole

The bill will remove the 'strike first, talk later' loophole under the Fair Work Act, consistent with the promises of the Labor Party prior to the 2007 election and the recommendation of the Fair Work Review Panel. In his speech to the National Press Club of 17 April 2007, the then Labor leader said:

... industrial disputes are serious. They hurt workers, they hurt businesses, they can hurt families and communities, and they certainly hurt the economy.

...

They [employees] will not be able to strike unless there has been genuine good faith bargaining.

This is not the case under the Fair Work Act, where employees are allowed to strike before bargaining has even commenced.

The bill will amend the Fair Work Act to provide that protected industrial action can only be taken if bargaining for a proposed agreement has commenced. This amendment will mean that industrial action cannot be the first step in the bargaining process, restoring a balanced and harmonious approach to enterprise bargaining.

The coalition will fix this loophole. In doing so, Labor's 2007 promise will actually be legislated.

## Individual flexibility arrangements

The bill introduces amendments to provide clarity and certainty for employees around the use of individual flexibility arrangements (IFAs).

IFAs are an important tool introduced by Labor with the intent of enabling workers and their employers to mutually agree on conditions that suit their needs, while ensuring that employees are better off overall compared to their underpinning employment instrument.

IFAs ought to be an important option to enable employees to, for instance, manage their childcare or other caring arrangements, to spend time with family or for other commitments. They are specific to the individual and not designed as a management tool for a business.

These amendments about IFAs are all based on the Fair Work Review Panel recommendations. They

also include further new safeguards to ensure that employees are better off.

To be clear, the current IFA framework in the Fair Work Act will stay, with additional protections put in place. This means that:

an employer cannot force an employee to sign an IFA or make it a condition of employment;

the employee must be better off overall than what they would have been under the applicable modern award or enterprise agreement; and,

a worker must provide a statement to the employer saying that the IFA meets their genuine needs and that they are better off overall.

Under the current system, unions can restrict the scope of flexibility terms under enterprise agreements through the bargaining process to only cover a single matter, for instance the taking of leave. This means that workers may be denied the chance to have IFAs on other matters even if they and their employer want to agree to more suitable arrangements. The amendments will deliver on the promises made by Labor in 2007 and provide that IFAs may be made in relation to all of the matters currently prescribed in the model flexibility term, to the extent that those matters are covered in the agreement. This will ensure that workers have access to fair flexibility without a veto by union bosses.

The bill also implements the Fair Work Review Panel recommendation that employers should, in limited circumstances, have a legal defence if they enter into an IFA in good faith believing it meets all the requirements of the legislation when it turns out later it does not. The defence will only apply where the employer believed on reasonable grounds that all statutory requirements have been met in relation to the IFA. The bill will also strengthen protections for employees by requiring a statement setting out that the arrangement meets their genuine needs and results in them being better off overall. This will make the position absolutely clear: employees will only make IFAs that provide for non-monetary benefits when the employees themselves make a clear statement in writing why they are better off overall. Two further amendments recommended by the Fair Work Review Panel will be made to provide clarity and certainty to both employers and employees. First, the unilateral termination period for IFAs made under enterprise agreements will be extended from 28 days to 13 weeks, consistent with the position for awards. In addition, the 13-week unilateral termination period for both modern awards and enterprise agreements will be placed in the legislation.

The second amendment will confirm the existing position that the better off overall test for IFAs can be satisfied by exchanging monetary benefits for benefits that are not monetary. This is already the case under the legislation as introduced by the Labor Party that operated while the Leader of the Opposition was the workplace relations minister. This position has been confirmed by the independent Fair Work Ombudsman. The amendment, combined with the government's new requirement for a statement in writing from the employee, will provide greater protection and certainty for all parties.

All other rules relating to an IFA will be retained, including that they cannot be made a condition of employment, must leave the employee better off overall and must be genuinely agreed to.

Anyone who opposes these amendments needs to explain to Australian workers why they should not have the opportunity to be better off overall if the arrangement genuinely meets their own needs, as assessed by themselves individually.

#### **Other Fair Work Act review recommendations**

The bill will also implement a number of other common-sense recommendations that were made by the now Leader of the Opposition's Fair Work Act Review Panel in 2012 but not implemented by the previous government.

The bill will clarify the interaction between leave and workers compensation by removing an exception that allows employees in a few jurisdictions to accrue or take leave while absent from work receiving workers compensation. This will remove inconsistency and confusion that currently exists for employees and employers and ensure that employees on workers compensation across the country are treated consistently.

In line with the Fair Work Review Panel's recommendation, the bill will clarify the circumstances where annual leave loading is payable when a person leaves their job. The change will restore the longstanding position, that employees are only entitled to annual leave loading when their employment ends if it is expressly provided for in their award or workplace agreement. This will address the confusion that currently exists as a result of the legislation and numerous awards adopting different positions. It will still allow for annual leave loading to be paid (including after employment has ended) if it is in the employee's modern award or enterprise bargaining agreement.

The bill will introduce a requirement that an employer must give an employee who has requested to extend their unpaid parental leave a reasonable opportunity to discuss the request unless the employer has already agreed to the request. To be clear, this discussion does not need to be face to face but can occur by other means, for example a teleconference or videoconference.

The bill will make changes to the transfer of business rules to assist the transfer of employees who wish to move between associated entities voluntarily. Currently, if an employee wants to take on a new position with an associated entity of his or her employer, there needs to be an application to the Fair Work Commission to prevent the employee's industrial instrument transferring with them. Under the changes, the terms and conditions of employment at the new employer will automatically apply to an employee transferring between associated entities on their own initiative. This change will reduce red tape for employers and employees in such circumstances.

In line with the recommendation of the Fair Work Act Review Panel, the bill will give the Fair Work Commission clearer powers to dismiss unfair dismissal proceedings 'on the papers' without conducting a conference or hearing in certain circumstances, such as where an applicant fails to attend a conference or hearing or fails to comply with an order or direction made by the commission. The bill includes safeguards to ensure procedural fairness for the parties before matters can be dismissed. This will help prevent employers incurring unnecessary costs in defending a claim that is not being seriously pursued by the applicant.

### **Interest on money held for underpaid workers**

The government is taking action to ensure that employees retain the value of money recovered and held by the Commonwealth on their behalf. When an employee who is owed money, for example unpaid wages, cannot be located then the employer pays the money to the Commonwealth. The Commonwealth holds onto the money until the worker can be found. No interest is payable on these moneys, no matter how long it has been held by the Commonwealth.

The bill will rectify this situation to enable the Fair Work Ombudsman to pay interest on amounts held for more than six months and worth more than \$100. Interest payments will be calculated using the consumer price index, similar to the approach used by ASIC for unclaimed money in bank accounts.

### **Conclusion**

The government released its workplace relations policy well before the 2013 election to address a range of key problems with the Fair Work laws. With this bill we are continuing to implement the commitments we made in that policy.

This bill will amend the Fair Work Act to provide a more balanced workplace relations system while safeguarding workers' conditions and protections.

The measures in the bill will help encourage investment in new projects that are important to the Australian economy by preventing unions from vetoing greenfields agreements. This will strongly signal to investors that Australia is open for business.

Unnecessary and costly industrial action will be addressed by ensuring that bargaining must have commenced before strike action can be taken.

Improvements to individual flexibility arrangements will enhance productivity and fairness by giving workers greater scope to negotiate arrangements with their employers that meet their genuine needs, as assessed by workers themselves. Everything we are doing on the issue of IFAs was recommended by the previous government's Fair Work Review Panel and clearly articulated in the coalition's election policy.

The bill will deliver on what was promised by the previous government in 2007 on union workplace access but never delivered. It will implement fairer and more effective right-of-entry laws that mean businesses can carry on without unnecessary disruption and employees can access union representation if they want it.

It will also address the failure of the previous government to implement a number of common-sense recommendations made by its own Fair Work Act Review Panel in 2012. The bill implements the coalition's publicly stated election policy—nothing more and nothing less.

The government is strongly committed to these measures. They are necessary to help build a more stable, fair and prosperous future for Australia's workers, businesses and the economy. We would therefore call on the Labor Party and all members of parliament to support the sensible and measured reforms included in this bill. I commend the bill to the House.

Debate adjourned.