Fair Work Amendment Bill 2014

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Law and Bills Digest Section

Contents

Purpose of the Bill ................................................................. 2
Structure of the Bill ............................................................... 2
Background ............................................................................. 3
Fair Work Act Review ............................................................ 3
Coalition Policy to Improve Fair Work Laws ......................... 3
Committee consideration ....................................................... 3
Senate Education and Employment Legislation Committee ... 3
Policy position of non-government parties ............................ 4
Position of major interest groups .......................................... 4
Financial implications .......................................................... 5
Statement of Compatibility with Human Rights .................... 5
Key issues and provisions ..................................................... 5
Part 4 of Schedule 1—Individual flexibility arrangements ...... 5
Background ............................................................................ 5
Provisions .............................................................................. 5
Comment ............................................................................... 7
Part 5 of Schedule 1—Greenfields agreements ...................... 7
Background ............................................................................ 7
Provisions .............................................................................. 8
Comments ............................................................................. 9
Part 8 of Schedule 1—Right of entry .................................... 10
Background ............................................................................ 10
Provisions .............................................................................. 10
Comment ............................................................................. 11
Concluding comments .......................................................... 12

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Commencement: Sections 1–3 commence on Royal Assent. Schedule 1, Parts 1–3, 5–7 and Schedule 2 commence the day after Royal Assent. Division 1 of Part 4 of Schedule 1 commences six months after Royal Assent. Divisions 2 and 3 of Part 4 and Parts 8 and 10 of Schedule 1 commence six months after Royal Assent unless earlier by Proclamation.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
Purpose of the Bill

This Bill makes amendments to the Fair Work Act 2009\(^1\) to respond to a number of outstanding recommendations from the 2012 Fair Work Review\(^2\) and to implement part of the Coalition’s 2013 election commitments.\(^3\) The more substantive amendments concern greenfields agreements,\(^4\) union right of entry and individual flexibility arrangements in modern awards and enterprise agreements.

Structure of the Bill

There are two Schedules to the Bill. Schedule 1 contains the substantive amendments to the Fair Work Act and Schedule 2 deals with application and transitional matters relating to those amendments.

Schedule 1 consist of ten parts:

- **Parts 1–3** make amendments to the National Employment Standards in Part 2-2 of the Fair Work Act in order to:
  - require an employer to discuss any request from an employee to extend their unpaid parental leave under section 76 before the employer refuses such a request
  - clarify that on termination of employment untaken annual leave must be paid out at the employee’s base rate of pay. The effect is that an annual leave loading would only be payable if an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement and
  - prevent employees from accruing or taking annual leave or any other type of leave while absent from work and in receipt of workers’ compensation.

- **Part 4** amends Part 2-3 and Part 2-4 in relation to the requirements for flexibility terms in modern awards and enterprise agreements and individual flexibility arrangements (IFAs) made under those terms. Amongst other things it will allow employers and employees to make IFAs about when work is performed, overtime rates, penalty rates, allowances and leave loading if these matters are dealt with in the particular enterprise agreement.

- **Part 5** amends Part 2-4 (Enterprise Agreements) and introduces changes to greenfields agreements. In particular it extends the good faith bargaining framework to the negotiation of single-enterprise greenfields agreements and provides 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.

- **Part 6** amends transfer of business provisions in Part 2-8 and provides that there will not be a transfer of business under that Part when an employee voluntarily moves between associated employers.

- **Part 7** amends the provisions dealing with protection action ballots in Part 3-3. It provides that an application for a protected action ballot order cannot be made unless bargaining has commenced.

- **Part 8** tightens the right of entry framework in Part 3-4 by amongst other things:
  - narrowing the eligibility rules for entry for discussion purposes
  - repealing amendments made by the Fair Work Amendment Act 2013 and reinstating pre-existing rules regarding the location of interviews and discussions and
  - changing the FWC’s capacity to deal with disputes about the frequency of union visits to premises for discussion purposes.

- **Part 9** provides 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.

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4. A greenfields agreement is a form of enterprise agreement that can be made under Part 2-4 of the Fair Work Act. It is an agreement relating to a genuine new enterprise that the employer (or employers) are establishing, where the employer has not yet employed any of the employees who will be necessary for the normal conduct of that enterprise and will be covered by the agreement (sections 172(2)(b), (3)(b), (4)).
• **Part 10** provides for the Fair Work Ombudsman to pay interest on monies recovered by the Commonwealth for workers who are initially unidentified and then later found and reimbursed.

The Bills Digest considers the more substantial amendments in the Bill contained in Parts 4, 5 and 8 of Schedule 1.

**Background**

**Fair Work Act Review**

When it introduced the *Fair Work Act* in 2008, the then Labor Government undertook to conduct a post-implementation review within two years of its full implementation on 1 January 2010. The final report of that review (the 2012 Review), was released on 2 August 2012.

The 2012 Review concluded that the effects of the legislation had been ‘broadly consistent’ with the objects set out in section 3 of the *Fair Work Act*. The Review also included 53 recommended changes to ‘encourage productivity growth’, ‘enhance equity in the workplace’ and ‘correct anomalies that have been revealed in the operation of the Act’. About one-third of the recommendations were generally accepted and not contentious, and were implemented by the *Fair Work Amendment Act 2012*. Further recommendations to do with family friendly provisions and union officials’ right of entry to the workplace were implemented in 2013 in the *Fair Work Amendment Act 2013*.

In its election policy commitment of May 2013 the Coalition promised to implement a number of outstanding recommendations from the 2012 Review. The Bill is in part a response to that commitment and in particular to Review Recommendations 2, 3, 6, 9, 11, 12, 24, 27, 31 and 43.

**Coalition Policy to Improve Fair Work Laws**

The Minister’s second reading speech states that the Bill gives effect to a number of commitments in the Coalition’s May 2013 election policy (*The Coalition’s Policy to Improve the Fair Work Laws*). The measures of that Policy relevant to this Bill include:

• creating three-month timeframes for the negotiation of greenfields agreements
• reinstituting the right of entry provisions which existed prior to the *Fair Work Act* and repealing further recent amendments made by the Labor Government
• guaranteeing workers have the right to access fair flexibility arrangements and remove the ability to restrict the use of individual flexibility arrangements while retaining the Better Off Overall Test and
• adopting a number of outstanding recommendations of the 2012 Review (see above).

**Committee consideration**

**Senate Education and Employment Legislation Committee**

The Bill has been referred to the Senate Education and Employment Legislation Committee for inquiry and report by 5 June 2014. Details of the inquiry are at the [inquiry web page](#).

**Senate Standing Committee for the Scrutiny of Bills**

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7. Ibid., p. 18.
The Senate Standing Committee for the Scrutiny of Bills has considered the Bill and has no comment.\(^{14}\)

**Parliamentary Joint Committee on Human Rights**

At the time of writing this Bills Digest, the Parliamentary Joint Committee on Human Rights had not published any comments in relation to the Bill. The Committee’s more recent report indicates that consideration of the Bill has been deferred.\(^{15}\)

**Policy position of non-government parties**

The Shadow Employment Minister, Brendan O’Connor has stated that the Opposition opposes the Bill on the grounds that it goes further than the Government’s pre-election commitments and its promise to implement specific recommendations directly from the 2012 Review.\(^{16}\) Mr O’Connor states that in a number of places, including in provisions dealing with individual flexibility arrangements, greenfield agreements and right of entry, the government ‘has clearly overstepped its election mandate to the disadvantage of employees’. He stated:

> It is now clear that the government could not be trusted to honour its most basic promise—namely, to implement recommendations from the 2012 Fair Work review without change. Instead, the government is putting down its own spin on Fair Work recommendations while trying to pass them off as a carbon copy of what the expert panel proposed.\(^{17}\)

It is reported that the Australian Greens will also oppose the Bill with industrial relations spokesman Adam Bandt MP stating that he disagrees with the amendments relating to individual flexibility arrangements and greenfields agreements.\(^{18}\)

**Position of major interest groups**

To date, there has not been significant analysis or debate on the Bill—perhaps indicating that it is what one commentator described, as a Bill with ‘few if any, surprises’.\(^{19}\)

The Business Council of Australia states the changes proposed in the Bill are:

> ... an important first step in reforming our workplace laws to be a better fit for a more productive and competitive economy, but more changes are needed to ensure a system that works for all workplaces and all workers.\(^{20}\)

It is reported that ACTU secretary Dave Oliver is opposed to the Bill, arguing the amendments ‘undermine key rights at work and were an exercise in the government ticking off the pre-election wish-list of the mining industry’.\(^{21}\) At the time of release of the 2012 Review, ACTU President Ged Kearney indicated the ACTU would vigorously reject any recommendations related to certain matters, including recommendations that would:

- undermine the right to organise and be represented by a union
- expand the use or scope of individual flexibility arrangements.\(^{22}\)

*The Australian* recently reported that industrial law specialist Professor Andrew Stewart has said that the Bill is not a return to Work Choices and Australian Workplace Agreements, but is a ‘pretty straightforward
implementation of the recommendations of Bill Shorten’s Fair Work Act review panel. It’s ironic that the Coalition is implementing at least as many of its recommendations as Bill Shorten did.23

Financial implications

The Explanatory Memorandum states that the Bill will have ‘nil’ financial impact.24

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.25 The Government considers that the Bill is compatible.

Key issues and provisions

Part 4 of Schedule 1—Individual flexibility arrangements

Background

The Fair Work Act provides that all modern awards26 and enterprise agreements are to contain a ‘flexibility term’. This enables an employee covered by the award or agreement and their employer to agree to an arrangement, called an individual flexibility arrangement (IFA)). This is an arrangement varying the effects of certain terms in the modern award or the enterprise agreement in order to meet the genuine needs of the employee and employer.

The usual flexibility term in modern awards enables an IFA to vary the terms about arrangements to do with when work is performed, overtime and penalty rates, allowances and leave loading.27

In contrast, the scope of an enterprise agreement flexibility term is currently a matter for negotiation between the parties to the agreement, although they are also able to adopt the model flexibility term in Schedule 2.2 of the Fair Work Regulations 2009 which limits variation of agreement conditions under IFAs to matters dealing with working hours, overtime rates, penalty rates, allowances and leave loadings.28 This model term applies by default where the parties do not include a flexibility term in an agreement and is based on the flexibility term included in modern awards.29

If the model term is not used, the flexibility terms must meet the further requirements of section 203.30 Under section 204 an IFA that does not meet one or more of the requirements for flexibility terms in section 203 still has effect as if it were an IFA, ensuring that an employee’s benefits under the arrangements are preserved.

An IFA has effect in the same way as if it were a term of an agreement (and is therefore enforceable in the same way) and the agreement operates as if it were varied by the IFA but only in relation to the employer and employee that have made the IFA.31

Provisions

Flexible terms in modern awards

Section 144 currently sets out the arrangements for flexibility terms in modern awards. It includes amongst other things that the flexibility term must identify the terms of the award that may be varied by an IFA, a requirement that an employee and employer genuinely agree to the arrangement, and a requirement that the employer ensures that the IFA results in the employee being better off overall than if there had been no IFA.

Part 4, Divisions 1 and 2 (items 6 to 10) of Schedule 1 of the Bill propose the following additions and changes in relation to the requirements for flexibility terms in modern awards.

25. The Statement of Compatibility with Human Rights can be found on pages I- lxxiii of the Explanatory Memorandum to the Bill.
26. Modern awards are awards that have come into effect since January 2010 as part of the award rationalisation process.
30. See below for a description of section 203.
The flexibility term must include a requirement for a genuine needs statement in any IFA. The employer will need to obtain this statement from the employee—setting out the employee’s reasons for why he/she thinks the flexibility arrangement meets the needs of the employee and results in the employee being better off overall under the arrangement (item 6, proposed paragraph 144(4)(ca)).

IFAs must include a statement specifying the notice requirements for termination of any IFA— to be either 13 weeks written notice of termination, or at any time if the employee and employer agree in writing to the termination (item 7, proposed paragraph 144(4)(d)).

Item 8 adds a clarifying note at the end of existing subsection 144(4) stating that non-monetary benefits can be taken into account in assessing whether an employee is better off overall under the IFA. Note the Explanatory Memorandum emphasises this is not a new requirement but only a clarification of existing arrangements.  

Item 10 inserts proposed section 145AA which provides protection from liability for the employer from contravention of a flexible term of a modern award in relation to a particular IFA, in cases where the employer reasonably believes the requirements of the term were complied with. The Explanatory Memorandum states that the genuine needs statements (see above proposed paragraph 144(4)(ca)) would be available as evidence of the employee’s state of mind at the time the arrangement was agreed to. In other words it provides protection from liability for the employer.

Flexible terms in enterprise agreements

Section 203 of the Fair Work Act sets out the requirements for flexibility terms in enterprise agreements. It includes amongst other things that the flexibility term must identify the terms of the enterprise agreement that may be varied by an IFA, a requirement that an employee and employer genuinely agree to the arrangement, a requirement that the employer ensure that an employee is better off overall under any IFA that may be made under the flexibility term and that any such IFA may be terminated by the employer or employee on up to 28 days notice – or by agreement at any time.

Part 4, Division 3 of Schedule 1 (items 11-18) of the Bill proposes the following additions and changes in relation to the requirements for flexibility terms in enterprise agreements.

The flexibility term must provide that if the terms of the enterprise agreement deal with arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading then these matters may be varied in any agreement agreed to under the flexibility term (item 11, proposed paragraph 203(2)(a)). In other words these would be the minimum matters about which IFAs could be made. Currently the inclusion of these five matters in the flexible term is subject to the bargaining process. The Explanatory Memorandum points out that these five minimum matters are already included in modern awards and are also part of the model term in Schedule 2.2 of the Fair Work Regulations.

The flexibility term must include a requirement for a genuine needs statement in any IFA. The employer will need to obtain this statement from the employee—setting out the employee’s reasons for why he/she thinks the flexibility arrangement meets the needs of the employee and results in the employee being better off overall under the arrangement (item 14, proposed subsection 203(4A)).

The flexibility term’s written notice of termination of an IFA is to be 13 weeks rather than the current 28 days (item 15, section 203).

Item 13 adds a clarifying note at the end of subsection 203(4) which relates to the Better Off Overall Test for IFAs. The note states that non-monetary benefits can be taken into account in assessing whether an employee is better off overall under the IFA. The Explanatory Memorandum emphasises that this is not a new requirement but only a clarification.

Item 18 inserts proposed section 204A which provides protection from liability for the employer from contravention of a flexible term of an enterprise agreement in relation to a particular IFA in cases where the employer reasonably believes the requirements of the term were complied with.

33. Ibid., p. 9.
34. Ibid., p. 10.
35. Ibid., p. 12. See Comment below.
Comment

In relation to the taking into account of non-monetary benefits for the Better Off Overall Test for IFAs it is of note that the Bill differs from Recommendation 9 in the 2012 Review.

The Explanatory Memorandum argues that non-monetary benefits can already be considered and therefore there is no need for a substantive provision.\(^{36}\) Hence the use of a note in items 8 and 13 rather than a specific legislative provision.

The Review instead recommended that the Better Off Overall Test in subsections 144(4)(c) and 203(4) be amended to expressly permit an IFA to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.

It would seem that implementing Recommendation 9 would provide more protection for employees by inclusion of the qualifier that the monetary benefit foregone must be relatively insignificant. Furthermore, some of the examples in the Explanatory Memorandum relate to the forgoing of penalty rates in exchange for flexible hours.\(^{37}\) Arguably penalty rates are not insignificant.

A further point regarding IFAs concerns the provisions already in the *Fair Work Act* that provide flexible working conditions. In other words, employees may not need to use IFAs to obtain benefits that were in fact implemented through family friendly provisions in the 2013 amendments to the *Fair Work Act*.\(^{38}\)

**Part 5 of Schedule 1—Greenfields agreements**

**Background**

As already stated, a greenfields agreement is a form of enterprise agreement that can be made under Part 2-4 of the *Fair Work Act*. It is an agreement relating to a genuine new enterprise that the employer (or employers) are establishing, where the employer has not yet employed any of the employees who will be necessary for the normal conduct of that enterprise and will be covered by the agreement (subsections 172(2)(b), (3)(b), (4)).

Greenfields agreements may only 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 (subsection 187(5)). A greenfields agreement is made when it is signed by the employer and each union that will be covered by the agreement (section 182).

**Greenfields agreements and good faith bargaining**

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. The good faith bargaining requirements as set out in subsection 228(1) are:

- attending, and participating in, meetings at reasonable times
- disclosing relevant information in a timely manner
- responding to proposals made by other bargaining representatives in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives and giving reasons for the responses to those proposals
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining and
- recognising and bargaining with the other bargaining representatives for the agreement.

Unlike other forms of agreement making under the *Fair Work Act*, there is currently no provision for bargaining representatives for 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.

\(^{36}\) Ibid., p. 12.

\(^{37}\) Ibid.

\(^{38}\) See A Holmes, *Fair Work Amendment Bill 2013*, op. cit.
The 2012 Review identified problems with this aspect of the existing greenfields agreement making framework noting:

[...] based on the evidence we have received in submissions and consultations, and a review of the data associated with greenfields agreements above, we consider there is a significant risk that certain bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia. This is because 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.

[...]

It appears to us that a very straightforward way of addressing the claims made about the capricious bargaining conduct of unions during greenfields negotiations is to extend the application of the good faith bargaining provision to negotiations for greenfields agreements. 39

Provisions

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 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 relevant provisions are described below.

**Item 20** amends the definition of bargaining representative in section 12 of the Fair Work Act. Its effect is to extend the definition of bargaining representative to persons who negotiate a single-enterprise greenfields agreement under new section 177.

This item does not affect multi-enterprise greenfields agreements and it is of note more generally that Part 5 of Schedule 1 applies only to single-enterprise greenfields agreements. 40 The Government’s explanatory materials do not explain why these new arrangements will not apply to multi-enterprise greenfields agreements. 41

**Item 23** inserts proposed section 177, which identifies persons who are bargaining representatives for single-enterprise greenfields agreements. The bargaining representatives are:

- an employer that will be covered by the agreement (proposed paragraph 177(a))
- 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 (proposed paragraph 177(b)) and
- a person appointed by an employer to be its bargaining representative (if the employer so chooses) (proposed paragraph 177(c)).

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 would have to meet the good faith bargaining requirements set out in section 228, would be able to apply for bargaining orders under section 229 and able to apply to the FWC to deal with a dispute about the proposed agreement under section 240.

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40. Under the Fair Work Act there are two main types of enterprise agreements—single-enterprise agreements and multi-enterprise agreements, both of which can be made as greenfields agreements (subsections 172(2) to 172(4)).
41. This may be due to the fact that the good faith bargaining regime has limited application to multi-enterprise agreements. Creighton and Stewart explain that although bargaining representatives negotiating multi-enterprise agreements are theoretically subject to the good faith bargaining obligations in section 228 of the Fair Work Act, bargaining orders cannot be made to enforce those obligations. Similarly protected industrial action cannot be taken in the context of bargaining for multi-enterprise agreements. B Creighton and A Stewart, op. cit., pp. 303–304.
Item 27 inserts proposed section 1788 to provide for a three-month period (notified negotiation period) for negotiating a single-enterprise 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 to commence a three month notified negotiation period for the agreement. Currently, there is no provision to formally set deadlines on the negotiation period of greenfields agreements. The Explanatory Memorandum points out that the giving of a ‘notified negotiation period’ is not mandatory and if employers choose not to use the notice, bargaining would proceed within the existing good faith bargaining framework until agreement is reached.42

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.

Item 28 inserts proposed subsection 182(4) which sets out an optional new process for the making of single-enterprise greenfields agreements. It provides that where:

- an employer that is a bargaining representative for such an agreement gives notice of the notified negotiation period to the employee organisation(s)
- the notified negotiation period has ended and
- the employer gave the bargaining representative for the employee organisation(s) a reasonable opportunity to sign the agreement and they did not sign

then the employer can apply to the FWC to approve the agreement. The agreement is taken to have been made when the employer applies to the FWC for approval.

The FWC approval for these agreements will be according to the existing approval requirements including that it passes the Better Off Overall Test;43 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; and that it is in the public interest to approve the agreement (sections 186 and 187). Item 33 inserts an additional consideration. The FWC will also be required 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 (proposed subsection 187(6)). A note to be added under subsection 187(6) clarifies that the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

Item 50 inserts proposed section 255A which places limits on the good faith bargaining framework where the notified negotiation period in relation to bargaining for a single-enterprise greenfields agreement has ended. At the point when the notified negotiation period ends, sections 228, 229, 230, 234, 235 and 240 cease to apply (that is, they are ‘switched off’) in relation to the agreement. So the practical effect is that these provisions—dealing with good faith bargaining requirements, applications for bargaining orders and FWC handling of bargaining disputes—cease to apply at the end of the three-month negotiation period.

Comments

Two observations concern the differences between the Bill and the 2012 Review recommendations.

Firstly the 2012 Review recommended that the Fair Work Act be amended to require employers intending to negotiate a greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees (Recommendation 28). This recommendation appears not to be taken up in the Bill.

Secondly, the 2012 Review did not recommend a three month termination period for bargaining under greenfields agreements. Rather, in order to improve timeliness Recommendation 30 provides that:

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43. Subsection 193(3) of the Fair Work Act provides that a greenfields agreement passes the Better Off Overall Test if ‘each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee’.
... when negotiations for a [...] greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party conduct a limited form of arbitration including 'last offer' arbitration to determine the content of the agreement.44

Labor and the Greens may find Recommendation 30 preferable. Greens MP Mr Adam Bandt is reportedly critical of the three month termination period, stating:

"The greenfields agreement provisions of this bill allow an employer to effectively negotiate with themselves, because all they have to do is wait out a three-month period and then take the matter to [the commission]."45

**Part 8 of Schedule 1—Right of entry**

**Background**

Union right of entry has been a contentious issue in the regulation of workplace relations in recent years. On the one hand right of entry to workplaces for the purposes of consulting with union members and those eligible to become members has been seen as fundamental to the core purpose of trade union organisation. On the other hand employer groups have argued that unbridled intrusion by unions into the workplace can interfere with the conduct of business. As has often been noted, balance is the key to facilitating entry and preventing intrusion.46

The Coalition in its 2013 election policy argued that the Labor Government right of entry reforms implemented in 2009 and subsequently amended in 2013 tipped the balance too far towards the rights of unions. In particular they argued that the 2009 changes were broken promises and the 2013 amendments went beyond the recommendations of the 2012 Fair Work Act Review. The Policy flagged an intention to tighten right of entry laws and revert to the 2007 framework.47 The amendments in Part 8 of Schedule 1 implement that policy.

**Provisions**

Part 3-4 of the Fair Work Act provides that union officials who hold the requisite right of entry permits, and who observe the prescribed procedural and substantive rules, are able to visit employees in their workplace in three circumstances:

- to investigate suspected breaches of industrial laws and fair work instruments in relation to or affecting their union members working on the premises (section 481)
- to hold discussions with employees who are, or are eligible to be, members of their union (section 484) or
- to investigate breaches of state occupational health and safety laws (section 494).

The amendments in Part 8 of Schedule 1 of the Bill deal with the second of these circumstances — the right of entry to hold discussions.

**Item 61** repeals and replaces section 484. Currently section 484 provides that a union official who is a permit holder is entitled to enter a workplace for discussions or interviews with employees or TCF award workers in cases where the union is entitled to represent the employees and where the employees wish to participate in those discussions. In other words there is currently no requirement that the employees concerned have their conditions regulated by an agreement that is binding on the relevant union.

**Proposed section 484** tightens the threshold for union entry so that in order to enter a workplace for discussions a union must also be covered by an enterprise agreement that applies to work performed on the premises (proposed subsection 484(1)).

In circumstances where the union is not covered by an enterprise agreement at the workplace, **proposed subsection 484(2)** provides that a union official is only allowed entry for discussions, where the union has been invited to send a representative to the workplace by a member or prospective member who works at the

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47. Liberal Party of Australia and the Nationals, op. cit.
48. TCF stands for textile, clothing and footwear.
premises. For this purpose the FWC will be able to issue invitation certifications. **Proposed section 520A**, inserted by **item 67**, sets out the requirements of such certificates, including that the FWC must be satisfied that a member/prospective member of the union works at the premises; that the union is entitled to represent the interests of the member and the member has invited the union to the premises for discussions. An invitation certificate must not reveal the identity of the member or prospective member to whom it relates. The Explanatory Memorandum explains that 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 union. 49

**Item 62** repeals sections 492 and 492A and substitutes **new section 492**. Existing section 492, inserted in 2013 provides that the permit holder and the occupier of the premises can agree on a room or area for interviews and discussions. If they cannot agree, the default is that the room where employees take their meal breaks can be used. Existing section 492A provides that the permit holder should comply with a reasonable request by the occupier of the premises to take a particular route to the room or area.

**New section 492** provides that the permit holder must comply with any reasonable requirement by the occupier of the premises to:

- conduct interviews or hold discussion in a particular room or area or
- take a particular route to reach a particular room or area.

**Proposed subsection 492(2)** provides examples of when a request may be unreasonable and includes amongst other things:

- the room is not fit for purpose and
- the request is made in order to intimidate or discourage or make it difficult to participate.

The new section is effectively reinstating the rules regarding rooms for discussion that existed prior to the 2013 amendments.

Section 505A, introduced in 2013, gives the FWC the power to deal with a dispute about the frequency of union entry to hold discussions. Under subsection 505A(3), the FWC may deal with disputes including by making orders imposing conditions on an entry permit, suspending or revoking an entry permit, and making any other appropriate orders. However under subsection 505A(4), the FWC may only issue such an order if it is satisfied that the frequency of visits is such as to require an ‘unreasonable diversion of the occupier’s critical resources’. **Item 65** repeals subsection 505A(4) with the effect of removing the need for the FWC to consider if the visit would cause an ‘unreasonable diversion of the occupier’s critical resources’.

Under existing subsection 505A(6) the FWC must take into account fairness between the parties when dealing with disputes about frequency of entry. **Item 66** repeals this provision and inserts **new subsections 505A(6) and 505A(7)**. The effect being that in addition to taking account of the fairness between the parties concerned the FWC must also take account of the combined impact of visits by permit holders on the operations of the employer or occupier.

**Item 69** repeals **Division 7 of Part 3-4 of the Fair Work Act**. This Division, inserted in 2013, requires occupiers of premises to enter into accommodation and/or transport arrangements for permit holders where the location of the premises is such that only the occupier of the premises can provide the accommodation and/or transport (that is, in remote areas). The accommodation and/or transport must be provided at a fee which is no more than is required to cover costs. The repeal of these provisions means that the previous approach of permit holders and employers making their own arrangements would apply.

**Comment**

Some of the provisions being amended in this Part (for example **items 62, 65, 66 and 69**) only commenced operation in January 2014 and therefore their likely impact is not known. It would seem these amendments are

more a reflection of the Government’s acceptance of the strong opposition to their introduction last year by employer groups, particularly within the building and mining industry.  

**Concluding comments**

The Bill is the third tranche of the Government’s legislative commitments regarding industrial relations reforms. The fairly sparse commentary and analysis on the Bill to date, is possibly an indication that it is a Bill with few if any surprises. Perhaps it also reflects the apparent focus on debating the forthcoming Productivity Commission review of the *Fair Work Act*, which reports suggest will be far more comprehensive than the 2012 Review.

In the main the Bill picks up a number of recommendations of the 2012 Review and some of the Coalition’s 2013 election policy commitments. Its most likely practical impact will be to encourage greater use of individual flexibility arrangements in enterprise agreements, introduce three month time-frames and good faith bargaining rules for greenfields agreements, and tighten right of entry rules to reduce union entry to workplaces. Labor and Greens opposition to the Bill combined with the Senate Committee inquiry means the Bill is unlikely to be finally considered by the Parliament before the Senate changes due to commence in July 2014.

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