Fair Work Amendment (Remaining 2014 Measures) Bill 2015

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Law and Bills Digest Section

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Date introduced: 3 December 2015
House: House of Representatives
Portfolio: Employment

Commencement: Sections 1–3 commence on Royal Assent. Schedule 1, Parts 1, 2, 4 and 6, and Schedule 2 commence the day after Royal Assent. Division 1 of Part 3 commences six months after Royal Assent. Divisions 2 and 3 of Part 3 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 the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
**Purpose of the Bill**

The purpose of the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (the Bill) is to reintroduce and seek passage of the measures removed from the Fair Work Amendment Bill 2014 (the previous Bill) by amendment in the Senate in November 2015. Like the previous Bill, the purpose of those ‘remaining measures’ is to make amendments to the *Fair Work Act 2009* to respond to a number of outstanding recommendations from the 2012 Fair Work Act Review and to implement part of the Coalition’s 2013 election commitments.

The more substantive amendments contained in the Bill concern 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** consists of six parts:

- **Parts 1 and 2** make amendments to the National Employment Standards in Part 2-2 of the *Fair Work Act* in order to:
  - 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 3** 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:
  - require flexibility terms in enterprise agreements to include as a minimum, that IFAs may deal with the following five matters: when work is performed, overtime rates, penalty rates, allowances and leave loading and
  - extend the notice period to unilaterally terminate an individual flexibility arrangement made under an enterprise agreement from 28 days to 13 weeks.

- **Part 4** 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 5** 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 earlier rules regarding the location of interviews and discussions and
  - directing the Fair Work Commission’s (FWC’s) capacity to deal with disputes about the frequency of union visits to premises for discussion purposes.

- **Part 6** 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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1. The Bill amended by the Senate became the *Fair Work Amendment Act 2015*, accessed 21 December 2015. That Act received Royal Assent on 26 November 2015 and all provisions apart from those relating to unclaimed moneys came into effect the following day.
5. The term ‘modern award’ is dealt with in Part 2.3 of Chapter 2 of the *Fair Work Act*. Modern awards are awards that have come into effect since January 2010 as part of the award rationalisation process.
The Key issues and provisions section below considers the more substantial amendments in the Bill contained in Parts 3 and 5 of Schedule 1. The remaining Parts are more minor and technical and are dealt with sufficiently in the accompanying legislative materials and also in Senate Committee inquiry submissions.

Background

History of the Bill

On 27 February 2014, the Government introduced the Fair Work Amendment Bill 2014 (the previous Bill) into the House of Representatives. The rationale for that Bill was to respond to a number of outstanding recommendations from the 2012 Fair Work Act Review and to implement part of the Coalition’s 2013 election commitments. For further background on the previous Bill the reader is referred to the relevant Bills Digest.

The previous Bill was subject to inquiry by the Senate Education and Employment Legislation Committee, with the Committee reporting on 5 June 2014 and recommending passage of the Bill. Separate dissenting reports by Senators from the Australian Labor Party and Australian Greens both recommended that the Senate reject the Bill.

The previous Bill passed the Government–controlled House of Representatives on 27 August 2014, however without Labor or Greens support, the Government was only able to obtain passage of the Bill through the Senate with crossbench support. The Senate crossbenchers obtained extensive changes to the previous Bill, omitting all but the provisions for negotiating greenfields agreements, protected action ballot orders, extending unpaid parental leave and reclaiming unpaid money.

The Government was unable to attract sufficient support from crossbenchers for key elements of the previous Bill that would have tightened union right of entry, amended provisions regarding IFAs, clarified obligations regarding payment of annual leave loading on termination and ensured transfers to related entities did not have to comply with transfer of business requirements. These provisions were removed from the previous Bill by amendment.

The Coalition and crossbench Senators Glenn Lazarus, John Madigan, Zhenya Wang, Nick Xenophon, Bob Day, David Leyonhjelm, and Ricky Muir provided 33 votes to pass the previous Bill as amended, while Labor, the Greens and independent Senator Jacqui Lambie opposed it.

The measures removed from the previous Bill are now replicated without change in this Bill, the Minister in her second reading speech stating that the Bill is being introduced to ‘allow for the continuation of constructive discussions with crossbench Senators’, with the Government intending ‘to work constructively with the crossbench to deliver on its election commitments’.

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7. Fair Work Act Review, op. cit. 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.
10. 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)). The crossbenchers also obtained further amendment of the measures to do with greenfields agreements. The original Bill enabled employers to take their proposed greenfields agreements to the FWC for approval if no deal had been reached within a ‘negotiating period’ of three months. The crossbenchers extended the negotiating period to six months. ‘Senate passes greenfields agreement changes’, Workplace express, 13 October 2015, accessed 8 January 2016.
11. See the key amendment that removed large sections of the Bill, accessed 21 December 2015.
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 4 February 2016 (the Senate Committee inquiry). Details of the inquiry are at the inquiry web page.  

As noted above, the previous Bill was also considered by the Committee and details of that inquiry are at the inquiry web page.

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

At the time of writing, the Senate Standing Committee for the Scrutiny of Bill has not considered the Bill. The Committee did consider the previous Bill and had no comment.

**Policy position of non-government parties/independents**

The Australian Labor Party and the Australian Greens have not yet commented on the Bill. However both parties opposed the previous Bill including the measures now reproduced in the current Bill.

The Labor Senators in their dissenting report argued the amendments to do with IFAs would remove some of the existing protections for employees and would target low-paid workers and vulnerable groups of workers who would be left unrepresented and at the mercy of more informed employers.

The Australian Greens in their dissenting report were also critical of the IFA measures describing them as ‘particularly disturbing’, arguing also that the amendments would allow unscrupulous employers to exploit employees.

At the time of writing, the views of individual cross bench Senators are not known, although the major amendments the Senators negotiated with the previous Bill would suggest there is at least some opposition to the current Bill.

**Position of major interest groups**

At the time of writing, the Senate Committee inquiry into the Bill has received 19 submissions, including 13 from groups representing employer and business interests and five from groups representing the interests of employees and unions. Employer groups consistently support the Bill whereas employee groups and unions oppose it.

Amongst employer groups, the Australian Industry Group states the amendments proposed by the Bill are sensible and consistent with key recommendations of the 2012 Fair Work Act Review:

> The amendments are largely technical in nature and respond to areas of confusion or inconsistency within the Fair Work system. They are important to restore the necessary balance between stakeholders in the employment relationship, and are integral for harmonious and productive workplace relations at the enterprise level.

The Australian Federation of Employers and Industries (AFEI) argues that the current IFA scheme was drafted with the intention of constraining their use and ensuring they could be readily challenged, with the consequence that their use is minimal. AFEI supports the amendments concerning IFAs arguing they give some recognition of these restrictions, although noting also that if the workplace regulation system was ‘balanced and reasonable, it would enable, not constrain, flexibility in workplaces and there would be no need for these cumbersome so

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called flexibility provisions’. Similarly in relation to the right of entry provisions AFEI argues in support of the amendments stating they remove certain of the unbalanced and unnecessary provisions introduced by the previous Labor Government in the *Fair Work Amendment Act 2013.*

Amongst union groups, the Australian Council of Trade Unions (ACTU) argues on the point of IFAs that there is already evidence that IFAs are abused and manipulated by employers and that this will be exacerbated by the proposed changes in the Bill. The submission states:

The proposed amendments contained in the Bill with respect to IFAs undermine existing protections for employees. If accepted these amendments will enable employers to make agreements that bear a remarkable resemblance to the old [Australian Workplace Agreements] AWAs and have similar consequences for employees.

In relation to the right of entry provisions, the ACTU states that the amendments are derived from right of entry provisions which existed under *WorkChoices*, arguing also:

[t]he new provisions clearly limit the capacity of vulnerable workers to access their union. Employees are unlikely to be aware of the legislative requirements concerning right of entry and may not know which union is eligible to represent their interests. Fear of retribution from their employer will also deter many employees from issuing an invitation to the relevant union.

**Financial implications**

The Explanatory Memorandum states that the Bill will have no financial implications.

**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. The Government considers that the Bill is compatible.

**Parliamentary Joint Committee on Human Rights**

At the time of writing this Bills Digest, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) had not published any comments in relation to the Bill. However the Committee in its report on the previous Bill raised questions regarding the Government’s Statement of Compatibility suggesting that in some respects it had not adequately addressed the questions of the Bill’s compatibility with certain international rights regarding just and favourable working conditions, freedom of association and the right to bargain collectively. Amongst other things, those questions related to the amendments regarding IFAs, right of entry and the changes to leave entitlements with regard to termination and workers compensation.

**Key issues and provisions**

**Part 3 of Schedule 1—Individual flexibility arrangements**

**Background**

The *Fair Work Act* provides that all modern awards 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

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21. Ibid.


23. Ibid., p. 28.


25. *The Statement of Compatibility with Human Rights can be found at pages v–xv of the Explanatory Memorandum to the Bill.*


27. Ibid. There is further discussion on the Committee report in the *Key issues and provisions* section below.
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. 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. 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.

If the model term is not used, the flexibility terms must meet the further requirements of section 203. 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. A failure by the employer to meet the requirements for flexibility terms may be a contravention of Part 3-1 of the Fair Work Act which provides general protections of workplace rights.

An IFA has effect in the same way as if it were a term of an enterprise 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.

**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 3, Divisions 1 and 2 (items 5 to 9) of Schedule 1** of the Bill propose the following additions and changes in relation to the requirements for flexibility terms in modern awards.

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 5, 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 6, proposed paragraph 144(4)(d)). The Explanatory Memorandum notes the existing provision does not specify a time frame for termination, although the 13 week time frame is consistent with a decision of the Full Bench of the FWC.

**Item 7** 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.

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31. Section 203 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.
32. B Creighton and A Stewart, op. cit.
34. Ibid., p. 5. Further detail is provided under the Comment heading below.
Item 9 inserts proposed section 145AA which provides some protection for the employer from liability for contravention of a flexible term of a modern award in relation to a particular IFA. The employer would not be liable in cases where he/she 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.  

Flexible terms in enterprise agreements

Section 203 of the Fair Work Act sets out the requirements for flexibility terms in enterprise agreements. As already noted, 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 3, Division 3 of Schedule 1 (items 10–17) 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 arrangement agreed to under the flexibility term (item 10, proposed paragraph 203(2)(a)).

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 13, proposed subsection 203(4A)).

The flexibility term’s written notice of termination of an IFA is to be 13 weeks (91 days) rather than the current four weeks (28 days) (item 14, section 203).

Item 12 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 17 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.

Comment

In relation to the Better Off Overall Test for IFAs and taking account of non-monetary benefits, it is of note that the Bill differs from Recommendation nine 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. Hence the use of a note in items 7 and 12 rather than a specific legislative provision.

However the 2012 Review 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.

35. Ibid., p. 8.
36. Ibid., p. 9.
37. Ibid., p. 9. See Comment below.
38. Ibid.
It would seem that implementing the Review’s Recommendation nine would provide more protection for employees by inclusion of the qualifier that the monetary benefit foregone must be relatively insignificant.

In response to the Human Rights Committee question about why recommendation nine was not adopted in the form recommended by the Review Panel in the previous Bill, the Minister for Employment stated:

In relation to recommendation nine, the Government considers that requiring valuation of benefits traded in an individual flexibility arrangement would introduce unnecessary red tape and place an unnecessary and unreasonable burden on employers and employees. Not all benefits traded in an individual flexibility arrangement are capable of being assigned an accurate or even meaningful monetary value, particularly if the benefits in question are not monetary. The value of monetary benefits is also likely to change over time, for example due to annual wage increases or promotions. Similarly, requirements that the monetary value foregone be ‘relatively insignificant’ and ‘proportionate’ are inherently arguable and uncertain and would add complexity without providing any further protection for employees.40

The Australian Workers Union (AWU) raised concerns about the amendment that expands the subject matter of IFAs (Item 10) submitting that it will encourage employers to propose IFAs on these matters as a template for all employees, rather than consider the individual requirements of each employee as is envisaged by the section.

The AWU submits that it is not appropriate for the Act to specify a wish-list for employers to propose to employees in relation to IFAs or to enshrine in enterprise agreements, particularly as these are the matters in which employees are likely to experience more pressure to negotiate away their superior conditions from awards or agreements that have been carefully considered by the Fair Work Commission.41

Union groups in submissions to the Senate Committee inquiry also argued against the introduction of the genuine needs statement and the provisions providing protection from liability for employers.42 They submit that both these amendments are a defence mechanism for an employer which would mean that the employer has no obligation to ensure that an employee entering into an IFA has given informed consent to this course of action. The ACTU states:

Because each IFA will now include a testimonial from the worker about how it meets their needs and leaves them better off overall, employers are likely to rely on that testimonial to demonstrate their ‘reasonable belief’ for the purposes of the defence. A successful defence will result in no exposure to a penalty, and no requirement to remedy any underpayment.

The ACTU submits that these amendments are likely to completely undermine the protection afforded to employees by the BOOT [Better Off Overall Test] and the requirement that an IFA be genuinely made.43

A final 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.44

Part 5 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. 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. The amendments in Part 5 of Schedule 1 of the Bill 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 5 of Schedule 1 of the Bill deal with the second of these circumstances — the right of entry to hold discussions.

Item 25 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 premises. For this purpose the FWC will be able to issue invitation certifications. Proposed section 520A, inserted by item 31, 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.

Item 26 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:

47. TCF stands for textile, clothing and footwear.
• 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 29 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 30 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 33 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

As noted above employer and employee interest groups have opposing views about the right of entry provisions, with employers generally arguing the amendments would remove certain of the unbalanced and unnecessary provisions introduced by the previous Labor Government, and employee groups stating that the amendments will unfairly restrict the access of workers to their unions at work.49

The Human Rights Committee in its report on the previous Bill also raised concerns with a number of the right of entry provisions and requested the Minister provide advice on whether the amendments were compatible with the right to collectively bargain and the right to freedom of association.50

In relation to most questions put to the Minister, the Committee chose to conclude the matter on receiving the Minister’s advice. However with regard to the repeal of the provisions that require employers to facilitate access to remote locations,51 the Committee disputed the Minister’s explanation and continued to hold the view that the amendments may be incompatible with the right to freedom of association and the right to bargain collectively. The Committee report argues:

The committee notes the Minister’s statement, that transport to a remote site ‘could cost upwards of $40,000 for a specially scheduled flight for union officials.’ The committee notes that under the Act an occupier is obliged to provide transport only if to do so ‘would not cause the occupier undue inconvenience.’ The committee further notes that under the Act the occupier is entitled to charge the permit holder a fee ‘provided that the fee is no more than what is necessary to cover the cost to the occupier of providing such transport’.

51. Sections 521A to 521D, proposed to be repealed by Item 33, Schedule 1 of the Bill.
Accordingly it is not clear that there is an obligation on an employer to provide the specially scheduled flight or to incur similarly high costs in providing transport.

The committee considers that the amendments may be incompatible with the right to freedom of association and the right to bargain collectively.\(^5^2\)

A final point to note is that some of the right of entry provisions being amended in this Part (for example items 26, 29, 30 and 33) only commenced operation in January 2014 and therefore their likely impact at the time of introduction in the previous Bill was not known. It would seem these amendments are more a reflection of the Government’s acceptance of the strong opposition to their introduction by employer groups, as evidenced by the submissions to the Senate Committee inquiries into both this and the previous Bill.

**Concluding comments**

The Bill is unusual, both in title and content, being a replica of the parts of an earlier Bill that failed to gain support from crossbench Senators. While the views of the crossbenchers are not clear at this stage, the Government has expressed optimism about further constructive negotiations with that group to secure passage of the Bill through Parliament.

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\(^5^2\) Parliamentary Joint Committee on Human Rights, op. cit., p. 157.