Australian Business Industrial

SUBMISSION

FAIR WORK AMENDMENT BILL 2012

Senate Standing Education, Employment and Workplace Relations Standing Committee

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140 Arthur Street
North Sydney NSW 2060

TABLE OF CONTENTS

Chapter	Page Number
Background	3
Schedules:	
1.	6
2.	8
3.	10
4.	11
5.	14
6.	15
7.	17
8.	18
9.	23
10.	24

BACKGROUND

Introduction

The *Fair Work Amendment Bill 2012* (the Amending Bill) was introduced into the House on 30 October 2012 and passed on 31 October 2012. The Amending Bill primarily seeks to amend the *Fair Work Act 2009* (the FW Act) but it also proposes some consequential amendments to the *Fair Work (Registered Organisations) Act 2009* and the *Road Safety Remuneration Act 2012* as well as consequential amendments flowing from the proposed change of Fair Work Australia's name to many other acts.

The Amending Bill was introduced into the Senate on 1 November 2012 and also referred to the Senate Standing Education, Employment and Workplace Relations Standing Committee on 1 November 2012 for review.

Australian Business Industrial (ABI) thanks the Committee for providing the opportunity for comment. These are ABI's submissions.

About Australian Business Industrial

ABI is registered under the *Fair Work (Registered Organisations) Act 2012* and under the (NSW) *Industrial Relations Act 1996.* It is approved under that Act as a peak council of employers. ABI is the successor of the former Chamber of Manufactures of New South Wales.

ABI members are also members of the New South Wales Business Chamber and ABI is the industrial policy and representative affiliate of the New South Wales Business Chamber.

About the Fair Work Amendment Bill 2012

The Amending Bill is quite large and it comprises 11 schedules. However much of the bill's length arises from consequential amendments particularly in the case of Schedule 9 which deals with changing the name of Fair Work Australia (the tribunal).

Much of the Amending Bill is intended to give effect to the recommendations arising from two separate inquiry processes.

Schedules 1 and 2 give effect to the Government's response to the report it commissioned from the Productivity Commission (PC), *Default Superannuation Funds in Modern Awards* (Report No. 60, October 2012). The PC focused its work on member benefit:

> "The overarching objective of the inquiry is to assess, and propose any necessary reforms to, the system such that it meets the best interests of employees who derive their default superannuation product in accordance with modern awards."[1]

The PC recommended a transparent process of fund selection based on the likely performance of various funds' MySuper products which was also aimed at promoting competition in these products between funds. The PC recommended that the process of selecting funds and identifying them in modern awards should be undertaken by Fair Work Australia in rather the same way as the annual wage review is conducted by Fair Work Australia.

The remaining schedules mainly give effect to the report the Government commissioned from an expert panel (Panel), *Towards more productive and equitable workplaces* (Report), although there are a number of proposed amendments which do not arise from the Report. The Panel's task was to undertake the Post-Implementation Review of the FW Act and this was reflected in its terms of reference. The policy and policy assumptions underlying the FW Act were not open to serious challenge.

One of the key issues facing the FW Act is the extent to which it and proposals for change have been subjected to a dispassionate analysis of costs and benefits. The FW Act is no different from preceding workplace legislation in this respect but that does not excuse failure to change this situation. *Forward with Fairness* focussed on driving productivity improvement:

> Australia now needs a third round of economic reform to meet the needs of our 21st century economy. Labor understands a critical component of this next vital reform project must be a new industrial relations system based on driving productivity in our private sector.[2]

It is clear that Australia's productivity performance (however measured) has been poor over the last decade or so. Long term low productivity growth is not a sustainable way of promoting national prosperity.[3]

Australia is also a high wage country which impacts on national competitiveness, especially because a declining exchange rate is not available to offset these competitive effects.

More needs to be done to align national workplace regulation with the realities of the national economy, including such factors as industry distribution, employer size and disruptive technological change than was available to the Panel to consider.

These submissions only address those proposed amendments which ABI wishes to comment upon. ABI does not oppose amendments or seek any change to matters which are not commented upon, or which would consequently change if ABI's preferred course were adopted.

Other workplace legislation

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[1] P 65, *Default Superannuation Funds in Modern Awards* (Report No. 60, October 2012), Productivity Commission

[2] P 1, *Forward with Fairness,* April 2007

[3] The Panel found no convincing evidence that the FW Act impeded productivity growth [P 73, Report] as a result of analysing performance under the FW system and predecessor systems. *Productivity and Fair Work* (Australian Business Foundation, March 2012), copies of which were forwarded to the Panel, was commissioned by ABI and the NSW Business Chamber. It found that the regulatory framework that enterprises operated in affected their capacity for productivity growth and that the climate imposed by the FW system on enterprise decision making was an inhibition on improving firm productivity.

There are two other recent bills with significant workplace impact which do not seem to have been referred to the Committee yet. These are the *Fair Work Amendment (Transfer of Business) Bill 2012* also introduced into the Senate on 1 November 2012 and the *Fair Entitlements Guarantee Bill 2012* passed by the House on 30 October 2012.

The Transfer of Business Bill basically imposes on transfers of business from non-referred state public sector employers to national system employers the transfer of business provisions applying to national system employers under the FW Act. This extends to transferring state employees the same statutory treatment as is given employees transferring between two national system employers. This gives equity of treatment, but it does not assist making government provided services more contestable, a highly desirable public good, because of the defects in the FW Act's transfer of business provisions.

The Fair Entitlements Bill basically legislates the General Employee Entitlements and Redundancy Scheme (GEERS) which has operate since 2001 under administrative arrangement. Putting aside the detail of the bill, ABI has general two concerns. The first is that the legislated scheme will provide protection for up to 4 weeks' redundancy pay per year of service. This standard (although replicating the current level under GEERS[4]) is well beyond the National Employment Standards redundancy pay entitlement and presents a moral hazard to parties in businesses which seem likely to go under. In these situations it can quite clearly be in the interests of both employer and employees to enter into a beneficial redundancy arrangement which will be paid for by the Commonwealth.

The second is that the Bill moves the GEERS protections from an administrative arrangement with discretion to a statutory scheme without. This significantly increases the moral hazard, since a recent beneficial agreement will be more difficult to challenge without discretion. The NES standard of redundancy pay is the most appropriate level of statutory protection.

[4] The level of protected redundancy pay under GEERS was only increased from 16 weeks to up to four years' service on 1 January 2011.

SCHEDULE 1

Schedule 1 of the Amending Bill proposes to amend the FW Act to deal with default superannuation contributions. Understanding the effect of Schedule 1 is complicated by the fact that there are a number of other bills which deal with Cooper Committee recommendations (*Stronger Super*) which all interact, and further complicated by the fact that the Amending Bill proposes to amend amendments yet to be made into the FW Act by earlier bills. Superannuation legislation is not itself simple.

In ABI's view real questions remain about the benefits of legislating employer obligations in both superannuation guarantee legislation and by award. Awards do not have the same universal coverage of the guarantee legislation, provisions in guarantee legislation are made immensely more complicated by having to deal with different types of pre-modern award-based transitional instruments, modern awards and state awards, and the place of awards in award-reliant workplaces means that they are often understood to fully prescribe a superannuation matter that they deal with.

ABI has read the submissions of the Australian Chamber of Commerce and Industry (ACCI) concerning Schedule 1 and generally supports the recommendations that ACCI makes about Schedule 1.

ABI does not wish to re-submit on the points made in those submissions, with one exception.

Modern awards should name funds, not products

ACCI draws attention to the important difference between a superannuation fund and a superannuation product. The essential difference is that employers make contributions into funds (and therefore their obligations must be phrased in terms of funds) whereas funds allocate incoming contributions into investment products (which are determined by the fund member, not the employer). Under *Stronger Super* the intention is that an employer will contribute into a default fund which offers MySuper unless the employee has chosen a fund. A fund will allocate contributions as directed by the member or into the (default) MySuper (investment) if the member has not made a direction.

S 149C(2) uses the term "default fund employee" (Schedule 1, item 12 Amending Bill) to describe an employee for whom contributions must be made in accordance with modern award terms, including fund names. A default fund employee is one covered by a modern award who has no chosen fund. Similarly s 149C(2) defines "default fund term" as a modern award term requiring an employer covered by it to make contributions for a default fund employee. The employer is to contribute for a default fund employee into a fund named in the award. It is important that Schedule 1 is not enacted with terms which require employers to contribute into a MySuper product.

It would also seem useful to amend the definition of "default fund employee" in s 12 (Dictionary) of the FW Act.[5]

[5] "Default fund employee" is inserted into the FW Act by s 149A (Schedule 4, item 1 and 5 of the

Single employer funds/products and enterprise awards

Schedule 1 inserts s 23A into the FW Act which defines "generic MySuper product", "tailored MySuper product" and "corporate MySuper product" (Schedule 1, item 9 Amending Bill). A generic MySuper product is one which is neither tailored or corporate, and under s 149C(1) (Schedule 1, item 13 Amending Bill) funds named in modern awards must offer a generic MySuper product.

"Tailored MySuper product" is not a term found in superannuation legislation. As provided by s 23A(1) of the FW Act it refers to a Large Employer which under s 29TB of the *Superannuation Supervision (Industry) Act 1993* (to be inserted by Schedule 1, item 9 of the *Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2012*) satisfies a number of criteria so that a fund (which offers one or more other MySuper products) can offer a MySuper product specific to that large employer.

Tailored and corporate MySuper products are essentially MySuper products which are available to the employees of a particular employer only and it is not intended that funds offering these non-generic MySuper products are named in awards because of that product. This is appropriate because these MySuper products are not available to any but one employer covered by a modern award.

However, the standard superannuation term currently in modern awards which have superannuation terms permits contributions into employer specific funds because they permit contributions into funds into which the employer was contributing prior to 12 September 2008. Section 149D(2) – (4) requires the award's default fund term to permit contributions to various types of fund which do not offer a MySuper product (defined benefit schemes, exempt public sector superannuation schemes and state public sector superannuation schemes).

Currently, enterprise awards which were made before the FW Act commenced remain also operative. Modern award coverage is excluded from their coverage and the FW Act provides that they will be modernized as modern enterprise awards or rescinded by 31 December 2013. Although ABI cannot provide figures, some of these enterprise award-based instruments will name company funds. Where an enterprise award-based instrument is rescinded the excluded modern award(s) will then cover the affected employees. It is also not clear how many enterprise award-based instruments will give rise to modern enterprise awards but consideration could be given to allowing modern enterprise awards to name the fund offering the relevant tailored or corporate MySuper product.

Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012), but s 149A of the FW Act is then repealed by the Amending Bill (Schedule 1, item 12 of the Amending Bill) which seems to leave s 12 of the FW Act defining "default fund employee" in terms of the repealed s 149A.

SCHEDULE 2

Schedule 2 of the Amending Bill also amends the FW Act to give effect to the Government's response to the PC's recommendations. After considering whether a panel external to Fair Work Australia or one internal to it should determine what funds were named in awards the PC recommended a panel comprising the President of FWA (or delegate), three independent panel members and three full-time FWA members. It did so partly on the basis of efficient use of resources:

> The core of the Commission's proposal is to ensure that there is a competent body that is transparent, procedurally fair and has appropriate expertise to make well-informed, merit-based decisions. The Commission considers that this can be achieved with a sufficient degree of independence and at a lower overall cost by establishing a panel within FWA that includes appropriate independent experts. [6]

Schedule 2 discontinues the current Minimum Wage Panel Members and establishes in their place a group of 6 part-time Expert Panel Members from whom three would be drawn to sit on the annual wage review or the first stage of the 4 yearly review of default fund terms.

The resulting Expert Panel comprises three Expert Panel Members and four full time tribunal members (schedule 2, item 43 of the Amending Bill). This generally corresponds with the actual operation of the Minimum Wage Panel to date. Section 575(2)(d) of the FW Act provides for the appointment of between three and six Minimum Wage Panel Members and s 620(1) of the FW Act provides that the Minimum Wage Panel comprises the President and 6 other tribunal members, at least three of whom must be Minimum Wage Panel Members. Only three Minimum Wage Panel members have been appointed and the Minimum Wage Panel has always sat with the President, three full time members and three Minimum Wage Panel Members.

Section 620(1) (schedule 2, item 43 of the Amending Bill) provides that the Expert Panel Members who sit on the annual wage review have knowledge in workplace relations, economics, social policy or business, industry or commerce. This is consistent with the current criteria for the appointment of Minimum Wage Panel Members under s 627(4) of the FW Act.

Section 620(1A) (schedule 2, item 43 of the Amending Bill) provides that the Expert Panel Members who sit on the first stage of the 4 yearly review of default fund terms have knowledge in finance, investment management or superannuation. This is relatively consistent with the PC's recommendation (except that the PC recommended that the third possible area of expertise be "superannuation advisory services").[7]

Replacement s 627(4) (schedule 2, item 57 of the Amending Bill) requires the Minister to be satisfied that an applicant for appointment as an Expert Panel Member has knowledge of, or experience in, one or more of workplace relations, economics, social policy, business, industry or commerce, finance, investment management or superannuation.

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[6] P 197, *Default Superannuation Funds in Modern Awards* (Report No. 60, October 2012), Productivity Commission

[7] P 199, *Default Superannuation Funds in Modern Awards* (Report No. 60, October 2012), Productivity Commission

It is not clear why there should be a composite group of Expert Panel Members rather than two specific panels. A possible reason for deciding on a composite group of Expert Panel Members is to allow flexibility in the allocation of Expert Panel Members to particular matters. This appears to raise the possibility that someone could be appointed to the group of Expert Panel Members and never sit on an Expert Panel during their term.

The Expert Panel's role in compiling the Default Superannuation List requires informed disinterested selection of appropriate generic MySuper products to achieve member best interest and transparent contestability. It would not be appropriate if the level of expertise in particular knowledge areas is reduced so as to favour appointment of Expert Panel Members with expertise across a number of areas.

Nor should allocation flexibility undercut the need for appropriate expertise on an Expert Panel constituted for one of the specific tasks. On its face it would seem inappropriate for an Expert Panel Member with (say) knowledge of workplace relations and superannuation to be preferred over a Member with knowledge of investment management when allocating Members to the Expert Panel for the Default Superannuation List.

Sections 620(1) and 620(1A) also prescribe the make-up of the panels constituted to conduct annual wage reviews and compile the Default Superannuation List. The annual wage review Expert Panel requires the President who chairs and manages the Panel whereas the Expert Panel to compile the Default Superannuation List is chaired and managed by either the President or some other presidential member appointed by the President. Both are constituted by three Expert Panel Members and three full time members in addition to the chair.

Other items in Schedule 2 deal with consequential changes arising from the replacement of the Minimum Wage Panel by the Expert Panel. Schedule 2 would commence on 1 July 2013 or later, if the Further MySuper Bill has not commenced. This timing does not interfere with the 2012 – 2013 annual wage review which would be concluded by the Minimum Wage Panel.

SCHEDULE 3

Schedule 3 deals with two amendments to provisions applying to modern awards and most of the proposed amendments arise from the Panel's recommendations and they are generally supported.

Part 2

Part 2 proposes to insert a note at the end of s 158(1) drawing attention to the tribunal's power to dismiss applications under s 587 of the FW Act (schedule 3, item 2 Amending Bill) and is intended to implement Recommendation 14. Recommendation 14 proposed an amendment to the FW Act to expressly empower Fair Work Australia to strike out applications which do not have a legislative basis and the Panel was clearly intending that this be a power exercised by the tribunal on its own motion, without involving non-applicant parties whose interests were enlivened by the application. It said:

> The Panel does, however, note the mutual concern of the ACTU and the ACCI about the apparent inability of FWA to strike out speculative and unmeritorious award variation applications. The impact of this apparent oversight is that employee and employer representatives that would be affected by such variation applications must intervene in these cases, incurring costs for preparing submissions and being represented in hearings. The Panel's view is that it is anomalous that FWA is not able to strike out applications that do not have a proper legislative basis and recommends that legislation be amended to rectify the issue. [8]

The proposed note draws attention to the tribunal's power under s 587 of the FW Act to dismiss applications on its own initiative if not made in accordance with the Act, is frivolous or vexatious or has no reasonable prospect of success. Inserting a note at s 158(1) rather suggests that the problem is of a different kind than what prompted the recommendation. The proposed amendment does little to address the issue of affected parties having to involve themselves in the matter.

If the FW Act is not to be amended to give effect to this recommendation it seems useful to consider altering the note to explicitly draw attention to the capacity under s 587 to dismiss on the tribunal's own initiative and also to consider amending s 587 or the note to make it clear that the tribunal is not required to hear from non-applicant parties.

[8] Pp 112 – 113, *Towards more productive and equitable workplaces*, DEEWR, August 2012

SCHEDULE 4

Schedule 4 generally implements the Government's response to Panel recommendations.

Part 1

Part 1 deals with making agreements. Section 172(6) (schedule 4, item 1 Amending Bill) provides that an enterprise agreement cannot be made with a single employee. This directly implements Recommendation 26. In making its recommendation the Panel concluded against the view adopted by a full bench of Fair Work Australia on the basis that an enterprise agreement made with a single employee appeared to conflict with the policy of the FW Act. The Panel said:

> …It is clear from our review of the policy material underlying the development of the FW Act that the scheme introduced by it expressly excluded the capacity to make a statutory individual contract. An enterprise agreement with one employee appears to us to be just that. In addition, the mechanism for individual flexibility associated with enterprise agreements and awards was intended to be individual flexibility arrangements. With the benefit of considering this broader range of policy material, in our view enterprise agreements should not be permitted with only one employee.[9]

The conclusion that an enterprise agreement with made with one employee appears to be a statutory individual agreement is not without its problems. It implies that where an agreement covers one employee only because the other employees covered by the agreement have left the enterprise the agreement becomes a statutory individual contract. The recommendation, and the proposed amendment do not go that far, and nor should they. The enterprise agreement is made with, and covers, a class of employees. It is not made with the individual.

Where an enterprise agreement is made with a single employee because of that person's distinctive role, and in compliance with ss 186(3) and (3A) which require that the persons covered by the agreement are fairly chosen, it is made with the class represented by the employee. Where, for example, the person is a single manager, the enterprise agreement would also cover any successor manager, it is not confined to the individual.

ABI does not support the recommendation.

Part 3

Part 3 deals with "opt-out" provisions in agreements. Section 194(ba) (schedule 4, item 4 Amending Bill) makes "opt-out" provisions unlawful. This gives effect to recommendation 23.

Opt-out provisions were not widely attempted but they point to the inadequacy of the mechanisms in the FW Act to set up appropriately flexible arrangements with employees. The use of opt-out provisions and agreements with single employees whose role and position is distinctly different from those of other employees in the enterprise both point to the inadequacy of the FW Act's individual flexibility arrangements provisions.

Individual flexibility arrangements seem not widely used. This is unsurprising. They are inadequate because of uncertainty (the uncertainty of the better off overall requirement especially where working patterns are altered, the uncertainty of their continuing operation in the face of unilateral termination or agreement making) and their scope. The need to better provide for flexibility in the FW Act and its instruments remains.

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[9] P 168, *Towards more productive and equitable workplaces*, DEEWR, August 2012

Part 4

Part 4 deals with the requirement for an applicant for a scope order to give written notice to other bargaining representatives. Scope orders determine the coverage of a proposed enterprise agreement where the bargaining representatives do not agree which employees should be covered by their negotiations.

Section 238(3)(a) (schedule 4, items 5 and 6 Amending Bill) alters the current requirement that the applicant for a scope order must give written notice to other bargaining representatives of the applicant's concerns about the agreement's proposed coverage and an opportunity to respond to those concerns. The amendments give effect to Recommendation 16 which was based on the difficulty, sometimes experienced, in ascertaining the identity of all other bargaining representatives. The Panel said:

> We do not recommend changes to the scope order provisions, with one exception. We have reviewed the decision of *CFMEU v Veolia Environmental Services Australia Pty Ltd.* Notwithstanding the lack of evidence of attempts to establish the identity of other bargaining representatives in that case[10], we are concerned that the requirement in s. 238 to notify all relevant bargaining representatives may in some cases be impossible to meet. This is particularly so because the identity of all relevant bargaining representatives may not be known to a party seeking a scope order. We note that the absolute obligation in s. 238(3) is in contrast with, for example, the obligation on an employer, when giving a Notice of Employee Representational Rights under s. 173, to 'take all reasonable steps'. We consider that the obligation to notify relevant bargaining representatives of a scope order application should be constructed in similar terms.[11]

While it is questionable that the requirement to give notice of the right to be represented in proposed negotiations and the obligation to give other bargaining representatives the opportunity to comment on a particular view about who a proposed agreement should cover are equivalent and in some way symmetrical the recommendation is not opposed.

As noted by the Panel scope orders are not commonly sought, but clearly where coverage is in dispute it needs to be addressed because of its importance for the terms of any resulting agreement. It is to be expected that the tribunal would require evidence of serious attempts by the applicant to notify other representatives of its concern and allow them the chance to respond. It should be beyond doubt that the employer's bargaining representative should not have been presented with the applicant's concern and given opportunity to respond.

Consideration could be given to modifying the proposed amendment to make this clearer.

Part 5

Subsections 174(1A) and (1B) (schedule 4, item 8 Amending Bill) requires that the notice of employee representational rights must contain regulated content and only that. It follows Recommendation 19.

A notice of employee representational rights should not confuse or mislead as to employees' rights to be represented and who an employee may be represented by. However, the recommendation and the proposed amendment means that a notice is invalidated by relevant information such as the employer contact person. It also means that an agreement can be refused approval because of

[10] [2010] FWA 9211, [15].

[11] P 139, *Towards more productive and equitable workplaces*, DEEWR, August 2012

a technical breach contained in a notice. This seems at odds with the policy intention of bringing non-bargaining employers into the bargaining process.

Consideration might be given to distinguishing material and non-material defects in a notice of employee representational rights.

SCHEDULE 5

Schedule 5 amends the FW Act general protections provisions. Item 1 (Part 1) gives effect to Recommendation 49.

Part 2

Section 336(2) (schedule 5, item 3 Amending Bill) amends the objects of Part 3-1 of the FW Act (General Protections) to explicitly provide that the protections which the objects give rise to are provided to a person in their role as employer, employee or otherwise. Item 2 is consequential.

> Item 3 inserts new subsection 336(2) to make clear that the protections in Part 3-1 are provided to a person (whether an employee, employer or otherwise) depending on the particular protection and the circumstances.[12]

The proposed amendment does not follow from any finding or discussion by the Panel, but there have been problems over the application of the general protections.

The Explanatory Memorandum is not particularly helpful and it is therefore unclear what mischief the proposed amendment addresses. The amendment seems to clarify that contractors have protections under Part 3-1 of the FW Act and that legal persons, not just individuals, are covered by the general protections.

The amendment is supported but consideration might be given to improving the assistance given in the Explanatory Memorandum.

ABI's support for this proposed amendment does not mean that it accepts that the current structure and scope of general protections is appropriate.

[12] P 36, para 156, Explanatory Memorandum.

SCHEDULE 6

Schedule 6 deals with a number of amendments to the unfair dismissal system. The unfair dismissal provisions in the FW Act continue to be problematic, as they were in various earlier forms.

The Panel correctly noted that the actual number of employers who experience an unfair dismissal is a small proportion of all employers and a small proportion of all involuntary separations. What these figures do not show is the impact of the threat of an unfair dismissal claim on enterprise termination practices and internal discipline.

In larger businesses the interaction between unfair dismissal and general protections provisions impacts dysfunctionally on disciplinary situations and terminations. ABI generally agrees with the Panel's conclusion (mainly concerning "go away" money):

> We think that to the extent there is a solution, it lies in the FWA processes and procedures.[13]

ABI also agrees with many of the Panel's recommendations. Not all of these have been included in the Amending Bill. It is not clear why.

Part 2

Section 399A (schedule 6, item 2 Amending Bill) provides that the tribunal can dismiss an application where an applicant behaved unreasonably in disregarding directions or listings by the tribunal or reneging on a settlement. However, s 399A(2) requires the employer to apply, which means that the employer must make out the case. This seems to miss the point of the Panel's recommendation. The Panel noted that s 397 requires the tribunal to hold a conference in the event of contested matters, but that this did not prevent some matters going on the papers. It said:

> Under Work Choices, the tribunal was given express power to decide not to hold a hearing when determining whether a claim should be dismissed for want of jurisdiction or because it was frivolous, vexatious or lacking in substance (see ss. 645 and 646). Presumably to deal with natural justice concerns, if the tribunal decided not to hold a hearing, it was required under s. 648 to invite the employee and employer to provide further information before making a decision. We consider that the FW Act should be amended to include similar provisions. We also believe that FWA's powers to dismiss applications should be extended to cases where a settlement agreement has been concluded, where an applicant fails to attend a proceeding (see s. 657 of Work Choices) or where an applicant fails to comply with any FWA directions. In relation to settlement agreements, we note the Federal Court's view in *Australian Postal Corporation v Gorman* [2011] FCA 975 that FWA is able to consider these in deciding whether to dismiss claims under s. 587, but consider that the FW Act should be amended to make this clear.[14]

Consideration could be given to more closely meeting the recommendation.

Part 3

Section 400A (schedule 6, item 4 Amending Bill) provides that the tribunal can award costs against a party which by unreasonable act or omission causes costs on the other party, including unreasonably failing to agree to a settlement. Experience in other jurisdictions where such

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[13] P 222, *Towards more productive and equitable workplaces*, DEEWR, August 2012
[14] P 229, *Towards more productive and equitable workplaces*, DEEWR, August 2012

provisions have applied is that cost orders of this kind are not often made. Clearly tribunals are not inclined to curtail applicants' rights by these provisions. The Explanatory Memorandum states:

> As with the new power to dismiss applications under section 399A, the power to award costs under section 400A is not intended to prevent a party from robustly pursuing or defending an unfair dismissal claim. Rather, the power is intended to address the small proportion of litigants who pursue or defend unfair dismissal claims in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.[15]

This explanation does not seem to properly capture the policy underlying the unfair dismissal provisions of the FW Act and is to this extent unhelpful:

> That is why Labor's *Forward with Fairness* policy outlined a new system for dealing with unfair dismissal claims – a fast and simple system, which left lawyers out of the picture and encouraged an end to the matter after a conference, not endless days of hearings before the Industrial Relations Commission. There will be a cap on compensation to increase certainty and to discourage speculative claims. Under Labor's policy there will be no 'go away money'.
>
> And that is why Labor's industrial relations policy, *Forward with Fairness*, included particular measures to assist small businesses with fewer than 15 employees to manage employee engagement and dismissal.[16]

Consideration might be given to amending the Explanatory memorandum to explain the amendment in a way which is consistent with the Act's policy.

Part 4

Subsections 401(1) and (1A) provide that where a lawyer or paid agent is engaged, costs can be awarded against them where they have caused costs on the other party by encouraging an application to commence, or to continue, when it should have been apparent to them that there was no reasonable prospect of success or because of an unreasonable act or omission.

These subsections apply whether leave has been granted the lawyer or paid agent to appear. This is supported.

However, under s 596(4) of the FW Act lawyers or agents which are employees of the party or employees of an organisation do not have to seek leave. Consideration could be given to extending the terms of ss 401(1) and (1A) to these classes of excluded agent or lawyer.

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[15] P 37, para 169, Explanatory Memorandum

[16] P 18, *Forward with fairness, Policy Implementation Plan,* August 2007

SCHEDULE 7

Schedule 7 primarily gives effect to panel recommendations 32 (a) – (d) concerning industrial action.

ABI recognizes there is a right for employees engaged in bargaining to have access to industrial action in appropriate circumstances, but access to protected industrial action should not be too available. It is not generally supportive of these recommendations, but accepts that the proposed amendments reflect the Panel's recommendations.

SCHEDULE 8

Schedule 8 of the Amending Bill amends the FW Act to introduce new or modified practices, new positions and greater powers for the President. Little of the schedule is derived from the Report or its recommendations and there is little explanation about the necessity of its proposed amendments. There seems to be a good case for delaying the passage of most of Schedule 8 to allow better identification of the need for its proposed changes and clarification of their consequences. This chapter deals with each part of Schedule 8.

Part 1

Part 1 provides that stay orders in an appeal or review matter may be determined by the President, a Vice-President or Deputy President (schedule 8, item 1 of the Amending Bill). This amendment responds to Recommendation 52 and is intended to improve the efficiency of the tribunal's response to stay applications[17]. The recommendation, which proposed that the President or a Deputy President, rather than only the appeal bench or its presiding member, could hear a stay application, is supported.

The question of Vice Presidents is discussed below at Part 6.

Part 2

Part 2 deals with conflicts of interest. It proposes that a failure without reasonable excuse on the part of a member in a matter to advise a conflict or potential conflict of interest should not lead to the member's termination of appointment as is currently the case under s 643(c) of the FW Act. Predecessor legislation had no equivalent provision to the current s 643(c) of the FW Act. ABI has no concluded view about this proposal (schedule 8, items 4 and 5 of the Amending Bill) but it is not clear why the amendment has been proposed, nor by whom. Nothing of this kind is discussed in the Report and it seems preferable to allow further consideration of the Part 2 proposed amendments.

Part 3

Part 3 deals with referrals of matter to, or from, a full bench. The Explanatory Memorandum links proposed ss 615A – 615C to ss 112 and 113 of the WR Act[18].

Section 112 of the WR Act provided that the Minister or party to a proceeding may apply to have a matter heard by a full bench and if the President concluded that the matter was "…of such importance that, in the public interest…" it should be dealt with by a full bench, it was to be referred. Section 113 WR Act provided that the President could decide to refer a matter to the President or a full bench. Sections 112 and 113 also provided that earlier evidence or proceedings could be taken into account by the President or full bench hearing the referred matter.

Neither ss 112 nor 113 provided a power for the President to remove a matter from a full bench as is proposed under s 615C (schedule 8, item 7 of the Amending Bill). Such a power seems very unusual. It carries an implication (undoubtedly unintended) that a full bench is subject to the

[17] P 44, paras 203 and 207, Explanatory Memorandum
[18] P 45, para 216 Explanatory Memorandum

President's views, particularly as s 615C is not confined to the period after a matter has been referred to a full bench and the bench begins proceedings.

Under the WR Act the role of the tribunal and how it was required to perform its functions differed from the equivalent provisions under the FW Act. It is not clear that a mandatory referral power in the event of demonstrated public interest is consistent with the underlying policy of the FW Act. For example, s 615A seems to cut across the s 581 obligation on the President to manage the performance of the tribunal for efficiency and service of employers' and employees' needs.

It is unclear that any request for a referral to a full bench has been declined in the face of demonstrated public interest. There was no discussion in the Panel's Report about any kinds of problems with the referral process that would give rise to the proposed amendments and it is difficult to understand what actual issues the proposed amendments are addressing. Section 615A (schedule 8, item 7 of the Amending Bill) seems to introduce a technical argument for referral with the capacity to dominate s 615 applications.

The existing provisions appear to work flexibly and without the suggestion that they need to be stretched to be used in appropriate circumstances or that deserving referrals are being systemically prevented from being referred.

Part 4

Part 4 deals with a new power to appoint acting commissioners in terms similar to the existing power under s 648 FW Act to appoint acting deputy presidential members to ensure the tribunal performs its functions effectively. The Explanatory Memorandum advises that appointment as an acting commissioner could be to cover an absence or because of tribunal workload[19]. The proposed amendment gives effect to Recommendation 53 of the Report (following a submission by the President to the panel) and it is not opposed.

ABI notes that matters before the tribunal also involve representatives of employers and employees. In ordinary circumstances an increased tribunal workload also means that representatives, particularly organisations, will experience a commensurate increase in their tribunal-related workloads. Increasing the number of tribunal members to cope with its peaks will not usually help organisations to meet the increased number of procedural obligations they also face with increased tribunal demands. Part of the solution is to consider those parts of the tribunal's workload which are imposed through statutory timing so as to avoid adding to peaks.

Part 5

Part 5 arises from Recommendation 51 and is not opposed.

Part 6

Part 6 deals with the establishment of two positions of Vice President and consequential changes. ABI does not understand the reasons for reintroducing two new vice presidential offices to the tribunal. Part 6 should not proceed without fuller explanation and informed discussion.

[19] P 46, para 224, Explanatory Memorandum

S 61 of the WR Act "established" the Australian Industrial Relations Commission (Commission) for the purposes of that act. Under s 61 the Commission comprised president, two vice presidents and any number of senior deputy presidents, deputy presidents and commissioners. This five level structure reflected the existing structure of the Commission under the *Industrial Relations Act 1988*.

For most of the years of the Commission's existence in its various forms it comprised the president, and numbers of deputy presidents and commissioners. In 1991 one vice president and the new rank of senior deputy president were added to its structure[20]. These amendments followed the recommendations of a committee appointed to undertake a review into the structure of the Commission and remuneration of its members. In 1994 the Commission's structure was again changed to provide for a second vice president because of the introduction of the new "Bargaining Division" into the Commission[21].

The five level structure introduced in 1994 continued until the establishment of Fair Work Australia under the FW Act. It could not be said that the absence of senior deputy presidents and vice presidents was because these ranks were not thought about or overlooked. The changed role of the tribunal and the wording of its functions and powers are indicative of the intention to move from the Commission's five level model.

The Panel concluded in its Report that:

> Overall, we believe FWA is taking a practical approach to administering the FW Act and in most instances is doing so expeditiously. While some submissions alleged inconsistency in decision making, we do not consider that the number and outcomes of Full Bench or court appeals reveal anything other than the usual activity associated with the introduction of new legislation. We would expect this to settle down as time passes. We have commented favourably in various sections of the report on the more efficient FWA processes for approving agreements, conciliating unfair dismissal applications and disposing of various other matters. FWA statistics in annual reports and provided to us demonstrate improvement in a range of areas. This is not to say, of course, that there is no room for improvement. Our recommendations in this chapter and elsewhere aim to further the desirable trend in the tribunal becoming more user friendly and resolving disputes more efficiently.[22]

Clearly inconsistency of decisions is an issue for those who use or are impacted by the tribunal. It is undoubtedly desirable to make outcomes as consistent as possible (and as predictable as possible) although a certain amount of balance against other factors is required.

As concluded by the Panel there is settling in activity associated with new legislation and in this area the FW Act appears to be sufficiently flexible. For example, the question of "opt out" provisions in enterprise agreements gave rise to different full benches deciding differently about approving agreements with "opt out" provisions. The tribunal's approach to "opt out" clauses in agreements was resolved by the President establishing a five member full bench to arrive at a definitive position. There are no indications that this was somehow beyond power or that the decision of that bench does not serve as precedent.

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[20] *Industrial Relations Amendment Act (No 2) 1991*
[21] *Industrial Relations Reform Act 1993*
[22] P 253, *Towards more productive and equitable workplaces*, DEEWR, August 2012

Fair Work Australia was established with three levels of member (president, deputy presidents and commissioners). Schedule 18 of the Transitional Act provided for the transfer of members of the Commission to Fair Work Australia on the basis that the then existing vice presidents, senior deputy presidents and deputy presidents were appointed as deputy presidential members of Fair Work Australia (schedule 18, item 1 Transitional Act). These transferring appointees retained the seniority they had in the Commission, their designations and their remuneration (schedule 18, items 2 and 4 Transitional Act). However, the retained seniority does not impact beyond s 619 of the FW Act which deals with determining the presiding member of a full bench.

There is no indication of why there should now be a new level of vice president or what problems its introduction is intended to address. There is no indication that the current provisions under s 647 of the FW Act for appointing an acting president are problematic. If vice presidents should be reintroduced, why not senior deputy presidents as well?

Part 7

Part 7 provides for handling complaints within the tribunal. Part 7 does not follow from any of the Panel's recommendations but much of the structure proposed by Part 7 is a consequence of a public investigation of court transparency and complaints about judicial officers' conduct and subsequent debate about the proposed remedies. This debate was unconnected to the Panel's Report or recommendations and it gave rise to the *Courts Legislation Amendment (Judicial Complaints) Bill 2012* (Judicial Complaints Bill) and cognate bills. These bills followed a number of enquiries investigating how best to accommodate complaints against judicial officers.

The proposed amendments in Part 7 introduce some significant new powers to the President. The scheme of Part 7 is broadly consistent with the Judicial Complaints Bill which is currently before the Senate and appears to have bipartisan support.

As well as the proposed processes, protections and powers for the President which are similar to those proposed under the Judicial Complaints Bill for the relevant Chief Judges, Schedule 8 adopts many of the key definitions such as "handle", "complaint handler" or "relevant belief" from the Judicial Complaints Bill and deals with the definition of "complaint (about an FWC Member)" in a broadly similar way. It is important to note, that although it is not obvious on the face of the provisions, a complaint does not include a complaint about matters in cases which are capable of being raised on appeal.[23] This is consistent with the Judicial Complaints Bill.

There are also some differences between the Judicial Complaints Bill and Schedule 8 of the Bill.

Tribunals are not the same as courts and do not have the same function. Nor is what supports or damages public confidence in a tribunal the same as the factors which affect confidence in a court. The Judicial Complaints Bill amends the Parliament's legislation establishing the various courts, it does not amend any of the Parliament's legislation establishing tribunals.

Section 581A(1)(b) (schedule 8, item 62 of the Amending Bill) provides power to the President to take any measures reasonably necessary to maintain public confidence in the tribunal including by restriction of duties. This appears to be a very wide power. As with the Judicial Complaints Bill

[23] P 51, para 269, Explanatory Memorandum

this power is not dependent on there being a complaint against the member. Unlike the Judicial Complaints Bill this s 581A power is proposed as a new section and not as an amendment to existing s 581 of the FW Act which prescribes the President's functions. Under the Judicial Complaints Bill the maintenance of confidence in the court is linked to the obligation on the Chief Judge to ensure the effective and expeditious discharge of the court's business.

"Maintaining public confidence…" is not link to the President's obligation under s 581 to ensure the tribunal performs its functions and exercises its powers efficiently and adequately serves employers' and employees' needs. Whilst s 581A does not restrict the discharge of the President's s 581 duties but as a separate section it does seem that "…maintaining public confidence" in the Bill has a much broader meaning than for the courts under the Judicial Complaints Bill. Further s 581A(1)(b) provides for "…temporarily restricting" the member's duties, not restricting the member to "non-sitting duties" as is provided by the Judicial Complaints Bill.

Section 581A(4) requires the President to refer a complaint to the Minister which has been substantiated and merits the member's appointment being terminated. Under s 581A(5) the Minister must consider whether to bring the matter to the parliament. This may be an appropriate sequence, but on its face it is difficult to understand why the Minister should decide whether the matter should go ahead.

Part 8

Part 8 addresses members engaging in outside "work" and proposes to alter existing FW Act provisions which address to question of outside "employment" for members of the tribunal and also members of the Road Safety Remuneration Tribunal. Although not an issue raised by the Panel the proposed amendments do seem to more appropriately address potential conflicts where there is outside remuneration.

SCHEDULE 9

Schedule 9 gives effect to the response to the Panel's recommendation that the tribunal's name be changed from Fair Work Australia at Recommendation 51. The proposed amendments do not give effect to the Panel's recommendation. The Panel said:

> The Panel consulted directly with new FWA President, Justice Iain Ross. He is also a strong advocate for changing the name of the tribunal, arguing that the current title undermines its independence and creates confusion. He proposed that as a minimum the tribunal be changed to 'Fair Work Commission', but said it would be preferable to separate it from the 'Fair Work' brand altogether, and rename it the 'Australian Employment Commission' or the 'Australian Workplace Commission'. After consideration, the Panel believes that the tribunal's name should be changed for two reasons. The first is to clearly separate the tribunal and its functions from the administrative arm of FWA. The second is to eliminate unnecessary confusion by lessening the plethora of bodies that have the words 'Fair Work' in their titles.
>
> First, FWA is an amalgam of the former Australian Industrial Relations Commission, the former Australian Fair Pay Commission and the former Australian Industrial Registry. Indeed, and somewhat confusingly, s. 575 declares that FWA consists of the President, the Deputy Presidents and the Commissioners, who collectively constitute the adjudicative tribunal. For completeness, we add that the FWO is an amalgam of the former Workplace Authority and the former Workplace Ombudsman. In our view, having the adjudicative functions and the administrative functions in a single body without any differentiation does create unnecessary confusion.
> …
>
> Second, there are too many bodies with Fair Work in their titles and this often creates unnecessary confusion. There is the FW Act and other related statutes, FWA, the FWO and the Fair Work Division of the Federal Court of Australia.[24]

Part 1

Part 1 contains the amendments to the FW Act. The actual change of name, an amendment to s 575(1) of the FW act continues Fair Work Australia which is established under that subsection as the Fair Work Commission (schedule 9, item 602 Amending Bill). The abbreviation "FWA" is inserted into s 12 by item 15. The remainder of the Part is consequential amendments.

The primary reasons for altering the name of fair Work Australia is to overcome confusion, partly because of the initial intention that the "Fair Work" system was to be housed under one diverse body, a one-stop shop, and partly because the actual "Fair Work" bodies are not easily differentiated by all of the system's potential users. Whilst the move from "Australia" to "Commission" achieves a move from a generic concept to a specific body, and goes part of the way, it is less clear that retention of "Fair Work" does much to reduce confusion as to the roles of the various Fair Work bodies.

[24] Pp 249 – 250, *Towards more productive and equitable workplaces*, DEEWR, August 2012

SCHEDULE 10

The major amendments in Schedule 10 clarify that matters arising under the FW Act which proceed through the court system should be subject to the same "no costs" general rules as applying to the tribunal. Whilst there are arguments on both sides to bringing multi-level court proceedings under the general "no-cost" rule, ABI accepts that the proposed is consistent with the policy of the FW Act.