ACTU Response to Towards More Productive and Equitable Workplaces: An evaluation of the Fair Work Legislation

21 August 2012
About the ACTU

The Australian Council of Trade Unions (ACTU) is the nation’s peak body for organised labour, representing Australian workers and their families. Nearly two million workers are members of the 46 unions affiliated to the ACTU.

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The Working Australia Papers

The Working Australia Papers are an initiative of the ACTU to give working people a stronger voice about social and economic policy. Although low and middle income Australians ultimately bear the costs of poor policy decisions made in relation to tax, infrastructure, retirement incomes, welfare and services, their voice is too often absent from national debates about these issues.

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Contents

About the ACTU ........................................................................................................... 2
   The Working Australia Papers .................................................................................... 2

Introduction .................................................................................................................. 1

Resolution of the ACTU Executive - 25 July 2012 .................................................... 4
   Review of Fair Work Act ............................................................................................ 4

Productivity and the Economy ...................................................................................... 5
   Productivity .............................................................................................................. 5
   Wages growth and inflation ...................................................................................... 6
   Industrial disputes .................................................................................................... 6
   Summary of the ACTU’s response to recommendations relating to productivity and the economy .......... 7

The Safety Net .............................................................................................................. 8
   Leave accrual while on workers compensation ............................................................ 8
   Unpaid parental leave ............................................................................................... 8
   The right to request flexible working arrangements ................................................ 10
   Leave loading on termination .................................................................................. 10
   Long service leave .................................................................................................. 11
   Public holidays ....................................................................................................... 11
   Flexibility Terms in Modern Awards ....................................................................... 12
   Variation Applications ............................................................................................. 14
   Summary of the ACTU’s response to the Panel’s recommendations relating to the Safety Net .............. 14

Enterprise Bargaining and Agreement Making ................................................................ 17
   Greenfields Agreements .......................................................................................... 17
   Access to arbitration ................................................................................................ 18
   Individual Flexibility Agreements (“IFAs”)............................................................... 20
   Dispute resolution clauses ...................................................................................... 21
   Good faith bargaining ............................................................................................. 21
   Other recommendations ......................................................................................... 22
   Summary of the ACTU’s response to the Panel’s recommendations relating to Enterprise Bargaining and Agreement Making ........................................................................ 22

Industrial Action .......................................................................................................... 25
   JJ Richards .............................................................................................................. 26
   Protected action ballots ......................................................................................... 27
   The provision of accommodation ............................................................................ 28
   The suspension and termination of protected industrial action ................................... 28
   Summary of the ACTU’s response to the Panel’s recommendations relating to Industrial Action ............ 29

Right of Entry ................................................................................................................. 30
   Frequency of visits ................................................................................................. 30
   Location of visits and facilitating effective right of entry ............................................ 31
   Investigating contraventions in relation to former employees ..................................... 31
   Other matters ......................................................................................................... 32
   Summary of the ACTU’s response to the Panel’s recommendations relating to Right of Entry .............. 32

Transfer of Business .................................................................................................... 33
   Summary of the ACTU’s response to the Panel’s recommendations relating to Transfer of Business .......... 34

Unfair Dismissal .............................................................................................................. 35
Introduction


The Panel was announced by the Minister in December 2011 and consisted of Reserve Bank board member and economist John Edwards, former Federal Court Judge the Honourable Michael Moore and Ron McCallum AO, Professor of Law at the University of Sydney. The terms of reference for the review required the Panel to conduct an evidence-based review of the extent to which the Fair Work legislation was operating as intended and where it could be improved to better meet its objects. Affiliates and the ACTU made submissions to and met with the panel in the course of the review.

This document is the ACTU response to the Panel’s report and recommendations. It does not represent the entire ACTU position in relation to the operation of the *Fair Work Act* (“FW Act”), but is designed to assist affiliates in considering the Report. It should be read in conjunction with the two written submissions provided to the Panel by the ACTU.¹

When the Fair Work Act commenced on 1 July 2009 it was the culmination of the long campaign for all Australians to repeal *Work Choices* and restore rights at work. The ACTU’s *Your Rights at Work* campaign had the objective of replacing *Work Choices* with a fair set of industrial relations laws. Labor’s *Forward with Fairness* policy took up the objectives of the *Your Rights at Work* campaign. It promised new legislation that would provide:

- An end to AWAs;
- A strong safety net, consisting of the NES and modern awards, that could not be undercut by agreement-making;
- A good faith collective bargaining system, including a low-paid bargaining stream;
- An effective right to be represented (in workplace bargaining, consultation over workplace change, and rights to seek union assistance in the workplace);
- Real protection from unfair dismissal (and removal of *Work Choices* exclusions); and
- The creation of Fair Work Australia as a strong independent workplace umpire.

Despite having significant concerns about the final form of the Act and our ongoing agenda for positive reform to advance the rights of working Australians, the ACTU supports the framework of the Fair Work Act as the right prescription for Australian workplace relations.

The Panel received many submissions from employer groups that looked backwards to WorkChoices (although generally disingenuously denying that was the source of their proposals).

The analysis and findings of Panel are a comprehensive rejection of this approach, and provide no basis for employers or political parties to continue to advocate a return to the failed system of the past that attacked basic rights of working people. It should put an end, once and for all, to claims that Australia needs a revert to the key elements of WorkChoices: statutory individual contracts, offered as a condition of employment, a vanishing safety net, tight restrictions on collective bargaining, wholesale exclusions from unfair dismissal protection and a neutered umpire.

The Panel confirmed that the fundamentals of the system are right, observing that “the current laws are working well and the system of enterprise bargaining underpinned by the national employment standards and modern awards is delivering fairness to employers and employees”\(^2\). The Panel found that:

- Differences in productivity growth patterns since 1995 are not explained by the differences in the industrial relations legislation over those periods;
- The number of days lost to industrial action under the FW Act are historically low and has remained within the band of historically low levels that have prevailed over the last decade;
- There is no evidence of an inflationary ‘wages breakout’ and that the FW Act has not of itself changed the trend in wages growth;
- There is no evidence that the FW Act’s unfair dismissal framework has made a discernible difference overall employment;
- The current form of enterprise bargaining and agreement making have been largely successful and that Australia should not return to prior systems of voluntary bargaining or individual statutory agreements is not warranted; and
- Enterprise agreements under the FW Act provide significant flexibility and that there is no basis to return to the WorkChoices system where employers were able to unilaterally determine wages and conditions.

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The panel’s report makes 53 specific recommendations. A substantial number of the recommendations go to technical issues of the sort that naturally arise from the transition to a new system. A number of the recommendations are positive, and reflect matters we put to the review, including on critical matters like the operation of agreements, industrial action and right of entry.

Despite the Panel’s key findings on the operation of the Act being consistent with the position advanced by the ACTU there are a number of recommendations which are of concern. In some cases, these recommendations are directly contrary to Labor policy. These matters are discussed in some detail in this response. It is the strong view of the ACTU that any move to reduce workers’ rights would be completely at odds with the report’s overall conclusions.

The overall approach of the ACTU in relation to both positive change and opposition to regressive proposals, was re-affirmed by the ACTU Executive at its meeting in July 2012. The resolution on the review, unanimously carried by the members of the Executive, is attached.

The Minister commenced a process of consultation on the report, including with the ACTU. Throughout this process, and consistent with the position adopted in our submissions to the review, the ACTU will advocate strongly for progressive improvement of the Fair Work Act consistent with its objects and will vigorously oppose any attacks on workers’ rights.

In Unity,

Tim Lyons
ACTU Assistant Secretary
Resolution of the ACTU Executive - 25 July 2012

Review of Fair Work Act

ACTU Executive notes that the Minister for Workplace Relations has received the report of Panel which conducted the post-implementation review of the Fair Work Act.

Consistent with our long-established priorities, the ACTU and many individual unions, made extensive submissions to the Review Panel. The union submissions dealt comprehensively with the Panel’s terms of reference, including the requirement that process involve an “evidence based assessment” of the operation of the Fair Work Act.

Unions set out our agenda for further positive reform to industrial relations laws to increase rights for Australian workers, including in relation to the safety net, rights to collective bargaining, dispute resolution & arbitration, right of entry, delegate rights and other organising rights, protection against unfair treatment, and work-life balance.

In contrast, the vast majority of employer submissions failed to engage with the terms of reference or provide evidence in support of their policy prescriptions. Instead employer submissions overwhelming proposed a return to the worst elements of the WorkChoices regime which was decisively rejected by the Australian people in 2007.

In particular, ACTU Executive calls on the Government to continue to reject calls from business (and any recommendations that might be contained in the panel report) that would:

- Restrict proper access to dispute resolution including arbitration;
- Restrict collective bargaining (including rights to take protected industrial action);
- Undermine the right to organise and be represented by a union;
- Expand the use or scope of individual flexibility arrangements;
- Promote the use or scope of unfair individual contracts; or
- Reduce unfair dismissal protections for Australian workers.
Productivity and the Economy

The report of the review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation* (“the Report”) found that the Australian economy has continued to perform well, and there is no evidence of a negative effect of the Act on various aspects of economic performance.

Productivity

In our submission to the review, the ACTU argued the following:

*Australia’s rate of productivity growth has slowed down over the past decade. Productivity growth peaked in the mid-1990s and has been slowing ever since. This cannot be ascribed to the Act, an Act which has been in operation for only two years*.3

The Panel appears to have accepted this argument. This is unsurprising, as any dispassionate evaluation of the relevant data would lead to the same conclusion. The Panel concluded its discussion of productivity growth with the following observation:

*Though the Panel has seen no convincing evidence that the FW Act impedes productivity growth, it is concerned that productivity growth has slowed. In the long run and for the economy as a whole, productivity growth provides for sustained increases in national living standards*.4

The productivity growth slowdown is a matter for concern, but industrial relations changes are not the cause of this slowdown. The Panel finds that, to some extent, the slowdown has been experienced in many OECD countries. The Review notes that Australian multi-factor productivity growth outpaced the OECD in the 1990s, but slowed in the 2000s, as it did in most advanced economies. Notably, Australia’s growth in the 2000s still exceeded that of Canada, which is a fellow resource-exporting country.

The Review includes a detailed analysis of the causes of the productivity growth slowdown, particularly the contribution of the resources boom and other industry-specific factors. The Panel notes that the boom in commodity prices leads mining firms to extract lower quality resources, which entails a greater cost (in terms of labour and capital inputs) for each tonne of resource that is extracted. Additionally, the commodity price

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4 Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation at p73
boom causes an increase in investment in resource projects, which have a multi-year ‘lag’ in which inputs are being used without outputs being generated\(^5\).

Both of these phenomena, which the ACTU identified in our submission to the Review, depress the measured level of productivity. The former effect is permanent (at least as long as prices remain elevated), while the latter is temporary. Neither is caused by industrial relations legislation. Detailed analysis included in the Review report concludes that structural change, driven by mining, has been an important factor affecting productivity growth over the past decade, accounting for somewhere between a large minority and the totality of the productivity growth slowdown.

Wages growth and inflation

The Review report also examined data regarding wages growth in Australia, to evaluate claims that the Act has induced an unsustainable, inflationary ‘wages breakout’\(^6\). It finds no evidence for this proposition.

The Panel found that, since the Act’s introduction, the Wage Price Index has risen at around the same pace as it did under the pre-WorkChoices Workplace Relations Act. The report also notes that the profits share of national income has risen, while the wages share has fallen, since the FW Act took effect. The report also notes that there is considerable dispersion in rate of wages growth by industry, with industries such as mining experiencing much more rapid growth than industries such as retail trade. Wages growth has also been more robust in states with lower unemployment rates, like WA\(^7\).

The Panel agreed with ACTU’s submission that these facts are inconsistent with claims of a ‘wages breakout’.

Industrial disputes

The Review report notes that the number of working days lost to disputes remains near record lows. The average under the current Act has been around a third of the level of the pre-Work Choices Workplace Relations Act, and only slightly above the Work Choices level. The Panel notes that there was a slight increase in the number of days lost in 2011, but that this can be ascribed to the increase in the number of agreements being renegotiated in 2011 (8,335) relative to 2010 (5,133), as well as the effect of disputes in the state public sectors, some of which are not covered by the Fair Work Act\(^8\).

\(^5\) Op cit n2 at p284  
\(^6\) Ibid, at p59-65  
\(^7\) Ibid  
\(^8\) Op cit n2 at pp75-77
Summary of the ACTU’s response to recommendations relating to productivity and the economy

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<thead>
<tr>
<th>No.</th>
<th>Recommendation</th>
<th>ACTU Response</th>
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| 1   | The role of Fair Work Institutions should be extended to include the active encouragement of more productive workplaces. | The ACTU has no opposition to government agencies providing information and assistance to bargaining parties in developing agreed processes to consult, and to work in partnership to improve productivity.  

We note that the President of FWA has already announced some steps the Tribunal intends to take in this regard in consultation with the ACTU and employer groups. |
The Safety Net

A strong and secure safety net of working conditions and entitlements is pivotal to a fair and equitable industrial relations system. The Panel makes a number of recommendations in relation to the safety net, some of which serve to strengthen the rights of working Australians, and some that cause the ACTU significant concern.

Leave accrual while on workers compensation

The ACTU opposes the Panel’s recommendation that employees should not accrue annual leave while they are receiving workers’ compensation. Annual leave is a basic safety net condition of employment, and the government should see its role as assisting and supporting injured workers rather than punishing them.

Paid leave continues to accrue while an employee is on any other form of paid leave, including paid parental leave. If paid leave accrues while an employee is in receipt of one government payment (including government-funded paid parental leave) then logically it should also accrue while an employee is on another government payment (i.e., workers compensation).

Unpaid parental leave

The Panel recommended several changes to unpaid parental leave.

The ACTU supports the Panel’s recommendation to change the FW Act so that unpaid special maternity leave, which is usually taken when an employee needs to take leave due to a pregnancy-related illness, should not reduce the amount of unpaid parental leave available. This change will be particularly beneficial to casual employees who cannot access paid personal leave when they are absent from work due to an illness.

The Panel also recommends that an employee who requests to extend their unpaid parental leave past the original 12 month period should meet with their employer to discuss their request. While the ACTU supports the idea of an employer being compelled to meet with their employees to discuss reasonable requests made, the imposition of an appealable requirement that an employer give due and proper consideration of a request would be a better approach. It cannot be assumed that due consideration will be given by an employer merely because a meeting is held between the employer and employee, and there must be a review mechanisms where a request is refused.
The current provision allows an employer to refuse a request on “reasonable business grounds”. Clearer guidance around the concept of this phrase would clarify matters for both employers and employees, and would bring the FW Act more in line with similar provisions in anti-discrimination law. In submissions to the review the ACTU advocated for the adoption of a provision along the lines of that contained in section 14A of the Victorian Equal Opportunity Act (1995) which outlines the obligations of employers in considering a request, including weighing up the importance of the request on the employee’s capacity to balance work with family and caring responsibilities against any potential effects the granting of such a request would have on the organisation. The ACTU remains of the view that this approach would more adequately ensure that workers’ right to request is effective and enforceable.

The ACTU has consistently argued that the right to request needs to be underscored by an effective right of review. Part of the Panel’s remit was to investigate whether the legislation was operating effectively in relation to “effective procedures to resolve grievances and disputes”, and it is disappointing that the Panel has declined to make any recommendation which allows for effective dispute resolution in circumstances where a request is refused. Indeed, the Panel’s stated reasons for refusing to accede to a review right (being a lack of evidence of abuse of the provisions) is inconsistent with its position on other areas of the FW Act. For example, in relation to introducing arbitration of greenfields agreements, the Panel acknowledges a lack of evidence of abuse leading to the apparent need to introduce arbitration, but nevertheless recommends reform to reduce a possible risk of abuse in future. The same rationale ought to apply here.

The ACTU also notes that the Panel’s report does not contain any recommendations to amend the FW Act to provide consistency with the Paid Parental Leave Act (“PPL Act”). Under the current system, an employee may access the Commonwealth Government’s paid parental leave scheme even if they have not been with their current employer over the past 12 months. This means that an employee who accesses their entitlement to 18 weeks’ paid parental leave is not necessarily entitled to any unpaid leave from their current employer. Although the Panel acknowledges that an employee “may therefore be forced to access another type of leave or potentially resign”, the situation is in fact more serious than that. If an employer refuses an employee’s request to take their 18 weeks of paid parental leave, under the FW Act as it is currently legislated, the employee may be forced to return to work before completing their 18 weeks of parental leave, thereby forfeiting the remainder of the payment. Alternatively, if the employee takes their leave without the approval of their employer, their employer may be entitled to terminate their employment on the grounds that the employee has abandoned their position. It is not sufficient to wait until the review of the PPL Act in 2013. Legislative changes to the FW Act should be considered immediately to ensure that all workers who access

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9 Op cit n3 at p5
10 The Panel suggest leaving discussion of any amendments to a later review of the PPL Act.
their 18 weeks of paid parental leave are protected from unfair dismissal and guaranteed a return to work in their original position when they return from their paid parental leave.

The right to request flexible working arrangements

A key point in the ACTU’s submissions to the review was to extend the right to request to all parents of adult children with a disability, workers aged over 55, and ultimately to all carers. Accordingly, we welcome the Panel’s recommendation to extend the right to request flexible working arrangements to a wider range of caring and other circumstances.

However, for the same reasons as cited above in relation to the extension of unpaid parental leave, the right to request flexible working arrangements need to be underscored by an effective right of review where the request is refused. In addition, there must be proper documentation in place to ensure that the employer has given due consideration to a request. As above, we note that a meeting with the employee in and of itself is no guarantee of due consideration, without some form of evidence or documentation.

Leave loading on termination

The Panel recommends that annual leave loading should not be payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.

The ACTU’s position is that annual leave loading should be payable on termination of employment unless an enterprise agreement expressly provides to the contrary.

The Panel’s reasoning in making this recommendation is flawed. Section 90(2) of the FW Act currently provides that, on termination, an employer must pay an employee the full amount that they would have been paid had they taken leave instead of being paid out their annual leave entitlement. Where an award or agreement provides for an annual leave loading (usually 17.5%), this leave loading must therefore be paid out on termination, as the employee would have received it if they had gone on leave instead of being paid out their leave.

The Panel erroneously asserts that “[f]or employers who traditionally have not had to pay annual leave loading on termination, they have incurred an additional cost in paying out the annual leave on termination.” This is incorrect. A correct interpretation of Section 90(2), in line with the Fair Work Ombudsman’s interpretation on

11 Op cit n3 at p58
this matter\textsuperscript{12}, is that leave loading is \textit{only} payable on termination if the employer would have had to pay the leave loading if the employee had taken the leave instead of being paid out for the leave.

An employer is no worse off under the current interpretation of Section 90(2), because they would have had to pay leave loading to the employee anyway, but an employee will be worse off if Section 90(2) is changed because they will no longer be entitled to their leave loading.

\textbf{Long service leave}

The Panel recommends the development of a national long service leave standard with a view to introducing this by 1 January 2015. The ACTU would welcome the involvement of unions and employer associations in discussions around a national long service leave standard within this timeframe. However, we reiterate our commitment to ensuring that no worker should be worse off as a result of the nationalisation and harmonisation of any workplace relations law.

\textbf{Public holidays}

The Panel’s view is that under the NES, there should be a nationally consistent number of public holidays each year for which penalty rates are payable, and that the number of days for which penalty rates are payable should not be able to be increased by declaring additional or substitute days by state and territory governments (although this would not prevent employers and employees entering into agreements to provide for penalty rates to be payable on a greater number of public holidays, nor to specify additional days as public holidays).

The ACTU opposes this recommendation.

The number of public holidays has always varied from state to state. Employers are familiar with the arrangements that apply in the relevant jurisdiction. The so-called ‘confusion’ which the Panel identifies is nothing more than a thinly veiled attack on public holiday entitlements.

The effect of the Panel’s recommendation would be to reduce minimum public holiday entitlements and reverse legislative amendments passed in NSW, Qld and SA to provide for additional public holidays following lengthy consultation with employers, unions and the broader community.

\textsuperscript{12} See \url{http://www.fairwork.gov.au/termination/final-pay/pages/default.aspx}
The recommendation also does not address the position of non-standard workers, which the ACTU has recently addressed in a submission to the modern award review process.\textsuperscript{13}

If minimum public holiday entitlements are going to be standardised, it would be better to increase the number of public holidays consistent with the approach adopted by several state governments, rather than adopt the lowest common denominator.

**Flexibility Terms in Modern Awards**

Before assessing the Panel’s recommendations in relation to flexibility terms under modern awards, it is important to note that there is already ample scope under the awards (and under contracts of employment) for employers to roster work in a flexible and efficient manner and in a way which takes into account the needs of individual workers.

In our original submissions to the review the ACTU highlighted the flexibility that is already available under, for example, the General Retail Industry Award 2010. That award already allows, amongst other things, for the implementation of shifts of up to 11 hours without overtime rates applying (except on Sundays), already provides for a wide span of hours for work performed on weekdays and on weekends (which could facilitate the needs of an individual employee with, for example, caring responsibilities), and allows employers to make permanent changes to rosters upon notice or to cancel an employee shift before it starts without payment of compensation.\textsuperscript{14}

If the genuine operational requirements of a business truly require even greater ‘flexibility’ than that which is already available under the modern awards, then this is something that should be negotiated collectively with the workforce and their union, to ensure that workers’ interests are properly and fairly accommodated. (We discuss the Panel’s recommendations in relation to flexibility terms in enterprise agreements below.)

The NES right to request provisions are the appropriate mechanism to assist employees to balance work and caring responsibilities, not IFAs. In particular, evidence around AWAs showed that employees in weak negotiating positions are less likely to benefit from individual arrangements and are more likely to benefit from a legislative entitlement to flexible hours. Women workers are in a particularly vulnerable situation

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\textsuperscript{14} Op cit n3 at pp37-38
because they were more likely to work in industries such as hospitality and retail where employers were less likely to comply with their employment obligations.

It is also important to note that, under the current FW Act provisions, the Panel acknowledges that there has been an overall increase in the incidence of provisions facilitating flexible working arrangements and the percentage of employees who are subject to provisions for flexible methods of engagement has increased under the FW Act\textsuperscript{15}. This would tend to indicate that the system is working satisfactorily now.

The Panel recommends that the better off overall test for enterprise flexibility agreements should be amended to expressly permit IFAs 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, is ‘relatively insignificant’ and that the value of the non-monetary benefit is proportionate.

The ACTU is concerned that implementation of this recommendation would legitimise some of the poor practices that were highlighted in the ACTU’s submission to the review.

An example cited by the ACTU in our original submissions to the review was that of IFAs implemented by the Spotless Group and which clearly did not meet the BOOT test. Under one of the arrangements, employees agreed that if other workers were absent on sick leave, Spotless could contact them and direct them to work the shift, waiving their rights to the usual 7 days’ notice and overtime rates of pay. The employees received no compensation, except ‘the opportunity to earn a higher income’. The ACTU continues to receive reports that many employers consider that arrangements that provide ‘the opportunity to earn extra income’ or that ‘meet employee needs’ can be used to offset the loss of entitlements. Implementation of the Panel’s recommendation risks legitimising such terms and undermining the policy rationale underpinning IFAs.

We reiterate our view that, consistent with Labor’s \textit{Forward with Fairness Policy Implementation Plan}, IFAs should only be permitted to provide for “upwards flexibility”\textsuperscript{16}. The law should not be changed to facilitate the surrender of employee entitlements under the guise that flexibility always leaves workers better off. This is particularly important in light of the ACTU’s experience that IFAs, like AWAs, are increasingly ‘template’ documents, or documents which are offered to groups of staff within a single enterprise, which are not responsive to the needs of particular individuals\textsuperscript{17}.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Op cit n2 at pp126 - 127
\item \textsuperscript{16} \textit{Forward with Fairness: Policy Implementation Plan}, August 2007 at p12
\item \textsuperscript{17} Op cit n2 at p38
\end{itemize}
\end{footnotesize}
Secondly, although the ACTU acknowledges the importance of transparent record keeping and agree that employers should be required to notify an appropriate authority when an individual flexibility arrangement is made, this may not be an appropriate role for the Fair Work Ombudsman. The more appropriate body would be the industrial umpire, Fair Work Australia.

Thirdly, the ACTU resists the Panel’s recommendation that a defence be established so that, if an employer notifies the Fair Work Ombudsman of the IFA and “believes on reasonable grounds” that all other requirements in relation to the IFA have been met, they will be able to avoid prosecution for contravention of the flexibility term. There should be no defence from the requirement to comply with a flexibility term.

Fourthly, the ACTU is concerned that increasing the notice period for termination of IFAs to 90 days may impair the very flexibility that employees seek by artificially lengthening the notice period for termination. It is important that workers are able to assess the utility of individual flexibility arrangements on an ongoing basis in order to ensure that their needs are being met.

The ACTU does welcome, however, the Panel’s recommendation that the sections of the Act that deal with flexibility terms under awards and agreements should include the prohibition on making an offer of employment conditional on entering into an individual flexibility arrangement. Employment which is made conditional on a flexibility arrangement undermines the very rationale for including flexibility terms in awards; they are not responsive to the needs of an individual, but are rather designed by an employer to undercut safety net entitlements.

Variation Applications

The ACTU also supports the recommendations made which relate to modern award variation applications. This includes the recommendation to grant clearer powers to FWA to strike out award variation applications what are not made in accordance with the FW Act or which are frivolous, vexatious or have no prospects of success, and the recommendation which would allow parties with standing (including unions with coverage of the relevant workers) to make applications to vary award terms or to vary an award to remove ambiguity or uncertainty, or to correct an error.

Summary of the ACTU’s response to the Panel’s recommendations relating to the Safety Net

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<thead>
<tr>
<th>No.</th>
<th>Recommendation</th>
<th>ACTU Response</th>
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<tbody>
<tr>
<td>2</td>
<td>Employees should not accrue annual leave while they are receiving workers’</td>
<td>The ACTU opposes this recommendation.</td>
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<td><strong>3</strong></td>
<td>An employer should meet with an employee who has requested extended unpaid parental leave and discuss their request.</td>
<td>The ACTU supports an amendment to the legislation which would require an employer to give due consideration to a request. However, the discussion needs to be underscored by an effective right of review where the request is refused.</td>
</tr>
<tr>
<td><strong>4</strong></td>
<td>The taking of unpaid special maternity leave should not reduce the amount of unpaid parental leave available.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td><strong>5</strong></td>
<td>The right to request flexible working arrangements should be extended to a wider range of caring and other circumstances, and an employer should meet with an employee who has requested flexible working arrangements and discuss their request, unless the employer has agreed to the request.</td>
<td>The ACTU supports an amendment to the legislation which would require an employer to give due consideration to a request. However, the discussion needs to be underscored by an effective right of review where the request is refused.</td>
</tr>
<tr>
<td><strong>6</strong></td>
<td>Annual leave loading should not be payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.</td>
<td>The ACTU opposes this recommendation. Annual leave loading should be payable on termination of employment unless an enterprise agreement expressly provides to the contrary.</td>
</tr>
<tr>
<td><strong>7</strong></td>
<td>Commonwealth, State and Territory Governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015.</td>
<td>The ACTU welcomes the involvement of union and employer group representatives in tripartite discussions of a national long service leave standard.</td>
</tr>
<tr>
<td><strong>8</strong></td>
<td>The number of public holidays under the NES on which penalty rates are payable should be limited to a nationally consistent number of 11.</td>
<td>Penalty rates should be available on all public holidays in accordance with Modern Awards and Enterprise Agreements.</td>
</tr>
<tr>
<td><strong>9</strong></td>
<td>The better off overall tests for enterprise flexibility agreements should be amended to expressly permit IFAs to confer a non-individual flexibility agreement should only provide for upwards flexibility. This change would legitimise some of the poor practices monetary benefit in exchange for a monetary benefit, provided that the value of the monetary benefit forgone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.</td>
<td>The ACTU opposes this recommendation.</td>
</tr>
<tr>
<td><strong>10</strong></td>
<td>The employer should be required to notify the Fair Work Ombudsman in writing when an individual flexibility arrangement is made.</td>
<td>While transparency and records of IFAs should be made would be valuable, this may not be an appropriate role for the FWO.</td>
</tr>
<tr>
<td><strong>11</strong></td>
<td>If an employer notifies the Fair Work Ombudsman of the IFA and “believes”</td>
<td>This ACTU opposes this recommendation.</td>
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on reasonable grounds” that all other requirements in relation to the IFA have been met, they have a defence against prosecution for contravention of the flexibility term.

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<tbody>
<tr>
<td>12</td>
<td>The notice period for the termination of an IFA should be 90 days rather than 28.</td>
</tr>
<tr>
<td></td>
<td>This ACTU opposes this recommendation.</td>
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<tr>
<td>13</td>
<td>The sections of the Act that deal with flexibility terms under awards and agreements should include the prohibition on making an offer of employment conditional on entering into an individual flexibility arrangement.</td>
</tr>
<tr>
<td></td>
<td>The ACTU supports this recommendation.</td>
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<tbody>
<tr>
<td>14</td>
<td>Clearer powers for Fair Work Australia to strike out award variation applications that are not made in accordance with the Act, are frivolous, vexatious or have no reasonable prospects of success.</td>
</tr>
<tr>
<td></td>
<td>The ACTU supports this recommendation.</td>
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<tr>
<td>15</td>
<td>Parties with standing to make applications to vary award terms, including industrial organisations that represent persons covered by the award, should have standing to make applications to vary the award to remove ambiguity or uncertainty, or to correct an error.</td>
</tr>
<tr>
<td></td>
<td>The ACTU supports this recommendation.</td>
</tr>
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</table>
Enterprise Bargaining and Agreement Making

The Panel’s report should put an end, once and for all, to employer claims that Australia should revert to key elements of WorkChoices such as statutory individual contracts (Australian Workplace Agreements) and unilateral employer greenfields agreements. Those arrangements were emphatically rejected by the Australian electorate at the 2007 federal election, and remain unpopular for good reason.

Rather than considering any return to WorkChoices-style arrangements, the Panel’s overall findings confirm that the FW Act has been largely successful in addressing the specific problems with previous regulatory regimes, and that revisiting prior systems of voluntary bargaining or individual statutory agreements is not warranted\(^\text{18}\).

Importantly, the Panel also recommends that agreement clauses which permit employees to opt out of the agreement should be prohibited, and that the making of an enterprise agreement with one employee not be allowed. The ACTU strongly supports these recommendations, which are consistent with the objects of the FW Act which relate to the primacy of genuine, good faith enterprise bargaining and agreement making.

However, the ACTU has significant concerns with a number of recommendations made by the Panel.

Greenfields Agreements

The ACTU supports a number of proposals made by the Panel in relation to greenfields agreements. These include the recommendations that:

- FWA be allowed to deal with bargaining disputes under s240 in relation to greenfields agreements;
- Fair Work Australia be given the power to intervene in bargaining and greenfields negotiations on its own motion where it considers conciliation could assist; and
- Employers intending to negotiate a greenfields agreement be required to take all reasonable steps to notify all unions with eligibility to represent relevant employees. This would ensure that the appropriate bargaining representatives are at the negotiating table.

However the ACTU has concerns in relation to the Panel’s recommendation that, where greenfields negotiations reach an impasse, a specified time period has expired and FWA conciliation has failed, FWA may -

\(^{18}\) Op cit n2 at p118
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.

Whilst the ACTU recognises that there are some situations where arbitration may be warranted as last resort, a more balanced set of remedies that extend to deadlocks where parties are bargaining for their first agreement or where surface bargaining is occurring (see below) should be implemented in lieu of the narrow approach recommended by the Panel.

The Panel’s recommendation will, in practice, only serve to allow large resources companies and their contractors an avenue to trigger arbitration where bargaining does not favour their interests. The FW Act should not allow arbitration at the request of multi-national resource companies while employees who have been bargaining for extended periods, or who have been bargaining with employers who have no intention of reaching agreement, are unable to access that same remedy.

The Panel acknowledges that this recommendation is made in response to a perceived or notional risk, rather than an assessment of evidence about the current operation of the FW Act. The recommendation is therefore at odds with the Panel’s stated task, the Panel’s own findings, and with the approach taken elsewhere in the report. We note, for example, that the Panel was “reluctant to recommend a general expansion of compulsory arbitration powers unless we can identify a circumstance in which the bargaining system is failing and it is in the public interest to address this failure”\(^{19}\).

However, if arbitration were to be made available for greenfield agreements, then the ACTU’s position is that the good faith bargaining provisions ought to apply (as recommended by the Panel).

**Access to arbitration**

The Panel has missed an important opportunity to give greater consideration to access to arbitration to assist vulnerable workers with little bargaining power who are engaged in enterprise-level bargaining. Currently, an employer can refuse to ever make any meaningful concessions to legitimate claims and bargaining continues indefinitely without the statute providing any clear remedy.

The Cochlear example is a case in point. Workers at Cochlear have been attempting to replace an agreement, which expired on 30 June 2007, for over five years. In August 2009, after the passing of the FW Act, the

\(^{19}\) Op cit n2 at p3
employees through their union were able to obtain a majority support determination order\textsuperscript{20}. Bargaining has been ongoing since that date, and although the employees have repeatedly indicated that they wish to negotiate an agreement, employees have not had any opportunity to vote on a proposed agreement\textsuperscript{21}.

Since the Panel’s report, FWA has found that Cochlear breached good faith bargaining provisions and issued a bargaining order against Cochlear\textsuperscript{22}. In making the order Commissioner Cargill noted the protracted nature of the negotiations and that Cochlear had “fought hard and has taken every procedural point”\textsuperscript{23}, but – despite this - had breached the good faith bargaining provisions only as a result of its failure to respond to the Union’s proposal for an agreement in a timely manner\textsuperscript{24}. This decision highlights the limitations of the relief that is available under the good faith bargaining regime.

The ACTU welcomes the recent decision of the Federal Court in Endeavour Coal Pty Ltd v APESMA\textsuperscript{25} insofar as that decision confirms that surface bargaining is inconsistent with the good faith bargaining regime and that employers must do more than “adopt the role of a disinterested suitor”\textsuperscript{26} in bargaining. However the decision highlights an underlying deficiency of the good faith bargaining provisions. In the decision the Federal Court found that three of the four comprehensive bargaining orders made by the Full Bench of FWA were beyond the Tribunal’s powers, and set those orders aside. This aspect of the decision highlights the limits of the obligation to bargain in good faith and the difficulty associated with the Tribunal’s ability to craft effective orders to remedy surface bargaining where it occurs.

The Panel report’s failure to address the inability of the current system to provide resolution to clear examples of protected or surface bargaining, such as the Cochlear example, is disappointing and is inconsistent with the object of the FW Act to place emphasis on enterprise-level collective bargaining.

The ACTU argued in its submissions to the review, and will continue to argue, that FWA should be empowered to make workplace determinations in situations where industrial action is not occurring, but where arbitration is appropriate: for example, where negotiations are protracted and there is no reasonable prospect of reaching agreement, where a negotiating party participates in bargaining but without a real intention to reach agreement, or where an agreement is being made for the first time and negotiations fail.

\textsuperscript{20} [2009] FWA 125 per Commissioner Harrison
\textsuperscript{21} The history of bargaining with Cochlear since the expiry of the 2005 agreement is set out in Australian Manufacturing Workers’ Union Submission to the Fair Work Act Review Panel Post-Implementation Review, February 2012 at paragraphs 3.58 – 3.79
\textsuperscript{22} [2012] FWA 5374 per Commissioner Cargill
\textsuperscript{23} Ibid, at [544]
\textsuperscript{24} Ibid
\textsuperscript{25} Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia [2012] FCA 764
\textsuperscript{26} Ibid at [35]
Individual Flexibility Agreements (“IFAs”)

The Panel has rightly rejected calls by employer associations to return to effective Australian Workplace Agreements (for example introducing binding four year terms for IFAs, or permitting agreements to be offered as pre-conditions to employment).

However, the ACTU opposes the Panel’s recommendation that every enterprise agreement should be required to include a flexibility term that, at a minimum, enables IFAs to be made concerning arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading.

The implementation of this recommendation would detract from the policy of achieving flexibility through collective arrangements and permitting the bargaining parties to determine the content of their agreement, both of which are recognised in the Panel’s report. It may also be a contravention of ILO Convention No 98 on the Right to Organise and Collectively Bargain to restrict or require an agreement to contain a particular term rather than merely providing a model clause for inclusion if parties agree.

The ACTU’s clear position is that the bargaining process is the appropriate place for determination of what is and is not appropriate to include in any IFA. As noted above, modern awards already allow for significant flexibility, for example in spans of hours.

As with IFAs available under the modern awards, it is important to remember that the bulk of AWAs that were entered into under the WorkChoices regime were not bespoke agreements tailored to the specific needs of individual workers and their boss. The reality was that at a given employer or even industry level they were almost always identical, take it or leave it offers, handed out at hiring or used to force workers to individually concede to things that they would not agree to collectively.

In its Forward with Fairness Implementation Plan the then-Labor government noted that “[t]he aim of the flexibility clause is to enable individual arrangements which are genuinely agreed by the employer and an individual employee” and that “[t]he terms of the clause are best decided at the enterprise level in the bargaining process” (emphasis added)\(^\text{27}\). The government ought to be held to these statements.

Indeed, the Panel’s recommendation that every enterprise agreement should be required to include the contents of the current model flexibility term is surprising given that the data quoted in the Panel’s report, and its findings, which suggest that such a reform is unnecessary. In particular, the Panel finds that:

\(^{27}\) *Forward with Fairness: Policy Implementation Plan*, August 2007 at p14
• the percentage of agreements containing flexible methods of engagement has remained very similar under the FW Act compared to collective agreements under WorkChoices\(^ {28} \); 

• the percentage of employees who are subject to provisions for flexible methods of engagement has increased in each category of flexible engagement\(^ {29} \); and

• there is an overall increase in the incidence of provisions facilitating flexible working arrangements\(^ {30} \).

These findings tend to indicate that the law currently allows for sufficient flexibility to accommodate workers’ genuine needs.

Dispute resolution clauses

The *Fair Work Regulations* provide a model term for dealing with disputes for enterprise agreements\(^ {31} \) which allows for the arbitration of disputes which cannot be resolved through mediation, conciliation or the issuing of an (non-binding) opinion or recommendation by the Tribunal. The Panel notes that seventy-three per cent of FW agreements contain either the model clause of a clause that provides access to arbitration at the initiative of one party\(^ {32} \). It is disappointing that the Panel declined to make a recommendation that dispute resolution procedures be adopted which provide for arbitration, where other means of dispute resolution have failed, in relation to disputes about the application of an agreement.

Good faith bargaining

The ACTU supported the introduction of good faith bargaining, and supports the recommendations of the Panel that:

• good faith bargaining obligations apply to proposed variations of enterprise agreements; and

• applications are able to be made for bargaining orders where bargaining commences more than 90 days before the nominal expiry date of an existing agreement.

\(^{28}\) Op cit n2 at p126  
\(^{29}\) Ibid  
\(^{30}\) Ibid  
\(^{31}\) In Schedule 6.1 of the *Fair Work Regulations 2009*  
\(^{32}\) At 162 of the Report, op cit n2
As discussed above, the ACTU will continue to fight for better access to arbitration where the good faith bargaining provisions (which are procedural rather than substantive) fail. The ongoing dispute at Cochlear is indicative of the need for FWA intervention in circumstances of protracted bargaining in which there is no reasonable prospect of reaching agreement or where surface bargaining is occurring.

Other recommendations

The ACTU supports the procedural recommendations of the Panel has made which will assist in ensuring open and transparent bargaining. These include the recommendations that:

- notices of representational rights include only the matters required by the Act and the Regulations. This will help ensure that employees are properly informed of their bargaining rights, rather than leading them to assume that they need to appoint a non-union representative; and

- notices of representational rights are lodged with Fair Work Australia and published on its website. This will help ensure bargaining proceedings with all relevant parties.

The Panel has also recommended that an applicant for a scope order should only be required to take ‘all reasonable steps’ to notify relevant bargaining representatives of the concerns that have led them to make the application. However, the better option would be to require the employer to let all bargaining representatives know who the other bargaining representatives are, and how to contact them. This would also have the collateral effect that all bargaining representations would be able to be easily identified and contacted for the purposes of engaging in bargaining, and for the service of correspondences which must proceed applications for good faith bargaining orders or scope orders.

Summary of the ACTU’s response to the Panel’s recommendations relating to Enterprise Bargaining and Agreement Making

<table>
<thead>
<tr>
<th>No.</th>
<th>Recommendation</th>
<th>ACTU Response</th>
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<tbody>
<tr>
<td>16</td>
<td>An applicant for a scope order should only be required to take all reasonable steps to notify relevant bargaining representatives of the concerns that have led them to make the application.</td>
<td>The preferable solution would be to require the employer to let all bargaining representatives know who the other bargaining representatives are, and how to contact them.</td>
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<tr>
<td>17</td>
<td>Applications should be able to be made for bargaining orders where bargaining commences more than 90 days before the nominal expiry date of an existing agreement.</td>
<td>The ACTU supports this recommendation.</td>
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<tr>
<td>18</td>
<td>Good faith bargaining obligations should apply to proposed variations of enterprise agreements.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>19</td>
<td>Notices of representational rights should include only the matters required by the Act and the Regulations.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>20</td>
<td>Notices of representational rights should be lodged with Fair Work Australia and published on its website.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>21</td>
<td>Individual union officials should not be permitted to act as bargaining representatives for workers where the union they are an official off does not have coverage for those workers.</td>
<td>The ACTU supports this recommendation which is consistent with Draft ACTU policy in relation to coverage and demarcation.</td>
</tr>
<tr>
<td>22</td>
<td>Fair Work Australia should have the power to intervene in bargaining and greenfields negotiations on its own motion where it considers conciliation could assist.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>23</td>
<td>Agreement clauses that permit employees to opt out of the agreement should be prohibited</td>
<td>The ACTU strongly supports this recommendation.</td>
</tr>
<tr>
<td>24</td>
<td>Every enterprise agreement should be required to include a flexibility term that at a minimum enables individual flexibility agreements to be made concerning arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading.</td>
<td>The ACTU strongly opposes this recommendation.</td>
</tr>
<tr>
<td>25</td>
<td>The Government should continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.</td>
<td>The BOOT is operating effectively to protect workers.</td>
</tr>
<tr>
<td>26</td>
<td>The Act should prohibit the making of an enterprise agreement with one employee.</td>
<td>The ACTU strongly supports this recommendation.</td>
</tr>
<tr>
<td>27</td>
<td>Good faith bargaining obligations should apply to greenfields negotiations, with any necessary modifications</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>28</td>
<td>Employers intending to negotiate a greenfields agreement should be required to take all reasonable steps to notify all unions with eligibility to represent relevant employees.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>29</td>
<td>FWA should be allowed to deal with bargaining disputes under s240 in relation to greenfields agreements</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>30</td>
<td>Where greenfields negotiations reach 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”</td>
<td>While the ACTU recognises that there are some situations where arbitration may be warranted as last resort, we would recommend a more balanced set of remedies that extend to deadlocks where parties are bargaining for their first agreement or where surface bargaining is...</td>
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<tr>
<td>arbitration, to determine the content of the agreement.</td>
<td>occurring.</td>
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Industrial Action

The UN and ILO recognise the freedom to strike as a fundamental human right. It is particularly important in the context of collective bargaining.

The Panel importantly finds that, even though there may have been a small increase in recent industrial action, the average number of days lost to industrial disputation during the 1980s was around six times higher than it was in 2011\textsuperscript{33}. Further, the 2011 figure is in line with the band of historically low levels that have prevailed over the last decade\textsuperscript{34}.

The following chart demonstrates the declining levels of days lost to industrial disputation over the period of various industrial legislative schemes:

![Graph showing declining days lost per quarter per 1000 workers]

Given the clear decrease in instances of industrial action, it is unclear why the Panel has called for restrictions on worker’s right to take industrial action.

\textsuperscript{33} Op cit n2 at p174
\textsuperscript{34} Ibid
In *JJ Richards and Sons Pty Ltd v TWU*\(^{35}\) it was held by a Full Bench of FWA that a protected action ballot order can be made before bargaining has commenced, so long as the applicant union is “genuinely trying to reach agreement”. In that case, the employer simply refused to bargain, which prompted the Union’s application for a ballot to be held.

The Panel’s recommendation that *JJ Richards* be legislatively overturned is inconsistent with some of its own conclusions, inconsistent with longstanding and settled law, and inconsistent with international law relating to the right to strike.

By reference to the explanatory memoranda to the FW Act, the Panel notes that the policy intent of the legislation was that “industrial action was to remain available as a means of persuading an unwilling employer to bargain”\(^{36}\). What the Panel fails to note is that this is consistent with the approach taken in the relevant legislation since the day enterprise bargaining was introduced in 1993. The right to strike in pursuit of bargaining claims in circumstances where an employer refuses to bargain has remained unchanged since 1993 despite significant legislative reforms by the Howard Government in 1996, 1999 and 2006, and by Labor in 2009.

It has always been a requirement that a party seeking to take protected industrial action be genuinely trying to reach agreement. That is the appropriate test. The Panel importantly refused to make any changes to this requirement, including by refusing to replace the test with a requirement to be bargaining in good faith. In doing so, the Panel report noted that it was “not presented with any evidence that the FW Act is not working as intended in this respect”\(^{37}\).

The *JJ Richards* decision has been unfairly and inaccurately described as amounting to “strike first talk later”. This description conveniently ignores the key pertinent fact: the reason for the TWU’s resort to action in that case was the employer’s refusal to bargain.

To alter this long-established area of law by requiring that bargaining must be occurring before industrial action can be taken would effectively create a structural incentive for employers to refuse to bargain, as consent to do so would trigger the right of workers to take protected action. This is contrary to one of the

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\(^{35}\) [2012] FWAFB 3377

\(^{36}\) Op cit n2 at p175

\(^{37}\) Ibid
principle objects of the FW Act which places emphasis on enterprise-level collective bargaining\textsuperscript{38}. Further, it is difficult to see how effectively granting non-unionised employees a veto over the right of union members to organise and take industrial action (by first requiring majority support to commence bargaining) is fair, consistent with the objects of the Act (which include the encouragement of collective bargaining), or consistent with international law. Rather, unions generally support the concept that industrial action should only be taken if a majority of affected union members support it\textsuperscript{39}.

The recommendation also appears to be inconsistent with the Panel’s general approach in other areas where it finds that there is no need to change the law where there is no evidence of a ‘problem’ that needs to be ‘fixed’. Indeed, the Panel accepts that there is no relevant data available on the frequency of this type of industrial action\textsuperscript{40}, and that the impact of the decision has been ‘minimal’\textsuperscript{41}.

The ACTU therefore strongly opposes the recommendation that \textit{JJ Richards} be overturned.

Protected action ballots

The ACTU supports the recommendation that ballots be conducted by electronic voting, and various other matters included in recommendation 32 (which relate to eligibility to be covered by a protected action ballot and recommendations designed to expedite ballots) subject to further consultation and consideration of possible collateral effects. The ACTU approach to possible amendments will be to support changes which facilitate members making decisions around protected action in a simple, efficient and democratic fashion.

The ACTU continues to oppose undue restrictions on the right of employees to take industrial action in support of bargaining claims. The ACTU will continue to campaign against the prohibition of industrial action in support of ‘pattern’ claims, allowing employer interference in ballots of union members, and other detailed and bureaucratic procedures relating to the conduct of a ballot which frustrate the speedy taking of industrial action (such as requiring a quorum of employees where no such quorum applies when employees approve the making of an enterprise agreement)\textsuperscript{42}.

\textsuperscript{38} s3(f) of the FW Act  
\textsuperscript{39} See ACTU submissions to the review, op cit n3 at p43  
\textsuperscript{40} Op cit n2 at p176  
\textsuperscript{41} Ibid  
\textsuperscript{42} See ACTU submissions to the review, op cit n3 at pp42-43
The provision of accommodation

The ACTU strongly supports the recommendation relating to the provision of accommodation to workers taking industrial action. This recommendation ameliorates the harsh and unfair effects of *CFMEU v Mammoet Australia Pty Ltd*\(^{43}\) in which Federal Magistrate Lucev found that the prohibition on strike pay contained in s470(1) of the FW Act required the employer to withdraw accommodation on the basis that it constituted a ‘payment’. That decision, which has now been confirmed on appeal\(^{44}\), undermines the ability of thousands of employees engaged in remote areas to take protected industrial action by imposing a significant financial burden on workers.

The suspension and termination of protected industrial action

The ACTU strongly supports the recommendation that the Minister’s power to make a declaration for terminated protected industrial action be repealed. The power is unduly repressive and allows inappropriate political intervention in industrial disputes. It is appropriate that the power be limited to the tribunal, which has an obligation to act judicially in respect of any application, including by providing natural justice and procedural fairness to affected parties.

However, the ACTU continues to oppose the *Work Choices*-style rules which effectively permit protected industrial action to be suspended or terminated at the election of the employer. Under these provisions, a large employer can take action to deliberately harm the economy or endanger lives, and FWA is then compelled to stop workers’ action. This was seen most recently in the Qantas dispute, where the employer threatened to lock out all staff, including those who were not engaged in industrial action, and ground its entire fleet worldwide in order to threaten significant damage to the national economy and thereby force the Minister to suspend industrial action on both sides.

Similarly, the provision which means that FWA must suspend protected action that is causing significant harm to the employer’s customers or suppliers is a provision which can almost always be invoked by large businesses. These limitations on the right to strike in support of legitimate bargaining claims cannot be justified. They contravene international law, ILO standards and the fundamental human right of workers to strike. As such, they are inconsistent with section 3(a) of the Act, which expresses an intention to comply with international law. They should be significantly modified or removed.

\(^{43}\) [2011] FMCA 802

\(^{44}\) *CFMEU v Mammoet Australia Pty Ltd* [2012] FCA 850 (14 August 2012)
Summary of the ACTU’s response to the Panel’s recommendations relating to Industrial Action

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<tr>
<th>No</th>
<th>Recommendation</th>
<th>ACTU Response</th>
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<tbody>
<tr>
<td>31</td>
<td>Protected industrial should be unavailable unless the employer has agreed to bargain or there is a majority support determination in place.</td>
<td>The ACTU strongly opposes this recommendation.</td>
</tr>
<tr>
<td>32</td>
<td>The provisions of the Act dealing with protected industrial action should be amended to:</td>
<td>While positive, this recommendation requires further consideration in relation to collateral effects.</td>
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<tr>
<td></td>
<td>(a) Allow protected action ballots to be conducted by electronic voting;</td>
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<td></td>
<td>(b) Allow an employee who becomes a member after a ballot order to be included on the roll of voters, and to vote on and take protected industrial action;</td>
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<td></td>
<td>(c) Allow an employee bargaining representative who is a union member to be included in the group of employees to be balloted pursuant to a ballot order obtained by the employees union, and to vote on and take protected industrial action;</td>
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<td></td>
<td>(d) Require Fair Work Australia to ensure that ballot agents conduct ballots expeditiously;</td>
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<td></td>
<td>(e) If the group of employees to be covered by a proposed agreement includes employees covered by an agreement that has not passed its nominal expiry date, allow the remaining employees to be the subject of a ballot order and to vote on and take protected industrial action.</td>
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<tr>
<td>33</td>
<td>The Act should be amended to provide that the provision of accommodation does not constitute ‘payment’, such that employers should continue to be required to provide accommodation even if employees are taking industrial action.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>34</td>
<td>The Minister’s power to make a declaration to terminated protected industrial action should be repealed.</td>
<td>The ACTU supports this recommendation.</td>
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Right of Entry

The purpose of right of entry provisions is to give effect to important workplace rights which are essential to a functioning democracy, including the right to representation, information and consultation in the workplace. Any limitation on right of entry ought to be carefully considered by reference to these fundamental rights.

Frequency of visits

The Panel recommends that FWA hold greater power to resolve disputes about the frequency of visits to a workplace by a permit holder exercising right of entry.

While the ACTU would welcome FWA intervention to end the practice of employers requiring union officials to attend workplaces on successive days in order to visit different groups of workers, we oppose giving Fair Work Australia power to restrict the legitimate exercise of the rights conferred by the legislation on permit holders.

The necessity of the recommendation is unclear. Although the Panel notes an apparent increase in right of entry visits to various worksites, it provides no industrial context to those workplaces (for example, whether those workplaces were engaged in protracted enterprise bargaining at the time or are large, multi-employer projects in remote locations).

Moreover, the recommendation seems at odds with the Panel’s own findings.

For example, the Panel importantly notes that:

- the time and resources which employers may need to set aside to attend to more frequent entry visits “is likely to be a minor imposition for most workplaces” in view of the strict requirements relating to the conduct of permit holders and the requirement to meet employees during non-work time; and

- a union permit holder is still subject to certain standards of behaviour and conduct whilst on the premises to minimise the inconvenience to the employer’s operations at the workplace; and

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45 As expressed in Forward with Fairness: Policy Implementation Plan, August 2007 at p12
46 Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation at p194
47 Ibid, at p194
• there is no data available on the frequency of visits by union permit holders to a workplace” and “[i]t is difficult, on the available evidence, to identify whether the instances of frequent visits are excessive such as to demonstrate that the motivations for entry are not consistent with those authorised by the FW Act"; and

• there are existing mechanisms which limit right of entry such that there is “no reason why unjustified excessive visits would not fall within th[e] range of conduct that is the subject of [the prohibition on intentionally hindering or obstructing any person or otherwise acting in an improper manner]".

In light of these findings, the ACTU is of the opinion that expanding the scope in which FWA is permitted to deal with a dispute about right of entry may amount to unduly restricting the legitimate exercise of the rights conferred by the legislation in an already heavily regulated area.

Location of visits and facilitating effective right of entry

The ACTU welcomes Fair Work Australia intervention to ensure that permit holders exercising their entry rights under Act are able to access the areas of the workplace where workers choose to congregate.

Employers routinely frustrate opportunities for workers to meet with their unions. The ACTU’s longstanding position is that the location of discussions with workers needs to be consistent with the objective of providing workers with the opportunity to meet with their union. In practice, this means that Organisers ought to be able to visit sites where the workers are located on a day-to-day basis.

Employers should be obliged to take reasonable steps to facilitate contact between permit holders and workers, for example by informing workers that the permit holders are on the premises and allowing permit holders to use transport offered to employees in remote locations.

Investigating contraventions in relation to former employees

The ACTU supports the Panel’s recommendation that the capacity for a permit holder to enter premises under s481 of the FW Act to investigate suspected contraventions relating to a member of the permit holder’s organisation should continue to apply, with appropriate limits following the end of the member’s employment.

48 Ibid
49 Ibid
Although other remedies may be available, those remedies involve delay and extra cost. It is appropriate – and consistent with the objects of the right of entry provisions - that, where an employee alleges a contravention, they are able to be adequately represented by their union. Fair Work Ombudsman inspectors have up to 7 years’ right of entry to inspect documents to look for suspected contraventions, including for former employees, and a similar right should apply to union permit holders because they perform a similar function.

Other matters

The ACTU continues to argue that notice requirements for OHS entry should be removed on the basis that any contraventions could be hidden or obfuscated by an employer if advance notice is given\(^{50}\), and that restriction on entry to residential premises should be removed\(^{51}\).

Summary of the ACTU’s response to the Panel’s recommendations relating to Right of Entry

<table>
<thead>
<tr>
<th>No</th>
<th>Recommendation</th>
<th>ACTU Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>35</td>
<td>Fair Work Australia should have greater power to resolve disputes about the frequency of visits to a workplace by a permit holder exercising right of entry.</td>
<td>The ACTU would welcome Fair Work Australia intervention to end the practice of employers requiring union officials to attend workplaces on successive days in order to visit different groups of workers. However we oppose giving Fair Work Australia power to restrict the legitimate exercise of the rights conferred by the legislation.</td>
</tr>
<tr>
<td>36</td>
<td>Fair Work Australia should have greater power to resolve disputes about the location of interviews and discussions with permit holders exercising right of entry.</td>
<td>The ACTU would welcome Fair Work Australia intervention to ensure that permit holders exercising their entry rights under Act are able to access the areas of the workplace where workers choose to congregate.</td>
</tr>
<tr>
<td>37</td>
<td>Permit holders should have some capacity to exercise right entry to investigate suspected contraventions relating to a member who is no longer an employee.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
</tbody>
</table>

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\(^{50}\) Op cit n3 p65

\(^{51}\) Ibid
Transfer of Business

The FW Act contains important protections designed to protect hard-fought wages and conditions where there is a transfer of business. The provisions are ‘intended to protect employee entitlements in a wider range of business transfer situations’ and it is important that they function to adequately protect workers.

For this reason the ACTU opposes the Panel’s recommendation that, where employees seek on their own initiative to transfer to a related entity of their current employer, their employment should be subject to the terms and conditions provided by the new employer and there should be no transfer of business.

Employers can already apply to FWA under s318 for an order that the existing terms and conditions of employment do not apply to a transferring employee. That application process is designed to ensure that employers cannot intentionally avoid obligations under instruments by ‘transferring’ employees between associated entities.

The Panel concedes that the application process under s318, which promotes union involvement to safeguard the rights of employees, is working efficiently and is not overly arduous, and that “the very fact that successful applications may require the support of the employees or the relevant union does not indicate that there is a problem with the provisions”. Indeed, the Panel notes that “it could be argued that engagement between employers and employees and their unions about such problems could promote industrial harmony in some instances”.

It follows that the Panel’s recommendation is at odds with its own finding that the s318 application process is operating functionally and effectively.

The definition of what would be ‘on the employee’s own initiative’ also poses significant difficulties. It is easily foreseeable that an employer could force an employee to make a ‘choice’ between losing their job or being redeployed into a related entity with lesser entitlements. Employers are likely to use such a loophole which s311(6) had previously closed, and wages and conditions will be driven down over time.

The ACTU opposes the recommendation, but if the recommendation were adopted then the application of a BOOT test help would ensure that the employee’s terms and conditions are not reduced overall.

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52 Op cit n2 at p201
53 Ibid, at p205
54 Ibid
Summary of the ACTU’s response to the Panel’s recommendations relating to Transfer of Business

<table>
<thead>
<tr>
<th>No</th>
<th>Recommendation</th>
<th>ACTU Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>38</td>
<td>Where employees seek on their own initiative to transfer to a related entity of their current employer, their employment should be subject to the terms and conditions provided by the new employer and there should be no transfer of business.</td>
<td>The ACTU does not support this recommendation.</td>
</tr>
</tbody>
</table>
Unfair Dismissal

The restoration of unfair dismissal protections was one of the key reforms implemented by the FW Act, and one which had a broad mandate arising from the 2007 federal election.

Contrary to claims by employers that the extension of the availability of unfair dismissal would act as a deterrent to employment, it is important and instructive that the Panel finds that - despite the significant expansion of the availability of the remedy - there is no evidence that the FW Act’s unfair dismissal framework has made a discernible difference to overall employment compared to WorkChoices.\(^5\)

The ACTU welcomes the Panel’s recommendation that employees on fixed period, specified task or seasonal nature contracts should be entitled to the protection of unfair dismissal where their contract was devised to attempt to avoid the unfair dismissal system. This clarification is consistent with the intention of the unfair dismissal protections and will help ensure that these workers are afforded protection.

The ACTU generally supports the alignment of the time limits between unfair dismissal claims and general protections claims. However a time limit of 60 days is more appropriate to ensure applicants have adequate time to get legal advice on their options (particularly in the case of general protections claims).

We generally support the Panel’s recommendations which are designed to ensure that workers have access to an unfair dismissal regime which is informal, expeditious and affordable. However the ACTU would recommend caution in adopting these recommendations. Shifting to a more informal, inquisitorial and determinative process and changes in relation to costs must ensure procedural fairness (particularly where the Tribunal might seek to dismiss an application prior to hearing), not impose a higher standard on sacked workers than on employers, be subject to the currently existing appeal rights, and not be unduly onerous on unrepresented parties.

Summary of the ACTU’s response to the Panel’s recommendations relating to Unfair Dismissal

<table>
<thead>
<tr>
<th>No</th>
<th>Recommendation</th>
<th>ACTU Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>39</td>
<td>Employees should have access to unfair dismissal if the fixed period or specified task or seasonal nature of their employment contract was devised to attempt to avoid the unfair dismissal</td>
<td>The ACTU supports this recommendation.</td>
</tr>
</tbody>
</table>

\(^5\) *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* at p82
<p>| | | |</p>
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</thead>
<tbody>
<tr>
<td>40</td>
<td>The time limit for lodging an unfair dismissal claim should be 21 days (increased from 14 days).</td>
<td>The ACTU supports alignment of the time limits between unfair dismissal claims and general protections claims, however the time limit of 60 days is more appropriate to ensure applicants have adequate time to get legal advice on their options.</td>
</tr>
<tr>
<td>41</td>
<td>Fair Work Australia should be empowered to deal with unfair dismissal applications through a hearing process that is informal, inquisitorial and determinative.</td>
<td>The ACTU would support an informal process subject to ensuring procedural fairness and the retention of existing appeal rights.</td>
</tr>
<tr>
<td>42</td>
<td>Fair Work Australia should have discretion to dismiss unfair dismissal applications where the parties have concluded a settlement agreement, where an applicant fails to attend a proceeding relating to the application, or where the application fails to comply with FWA directions or orders relating to the application.</td>
<td>FWA processes and procedures should not impose a higher standard on sacked workers than on the top end of town.</td>
</tr>
<tr>
<td>43</td>
<td>FWA should be able to exercise its powers to dismiss unfair dismissal applications without holding a hearing, but should invite the parties to provide further information before exercising these powers.</td>
<td>Appropriate safeguards are required to ensure that there is procedural fairness when dismissing any application.</td>
</tr>
<tr>
<td>44</td>
<td>The President of FWA should consider requiring applicants to provide more information about their dismissal in the initial documentation lodged with FWA.</td>
<td>The ACTU supports this recommendation provided that the requirements are not unduly onerous on unrepresented parties.</td>
</tr>
<tr>
<td>45</td>
<td>The costs provisions for unfair dismissal should allow FWA to make an order for costs against a party that has unreasonably failed to discontinue a proceeding, or unreasonably failed to agree to terms of settlement that could have led to the discontinuing the application, or that has through an unreasonable act or omission caused the other party to incur costs.</td>
<td>The ACTU supports this recommendation provided the requirements are not unduly onerous on unrepresented parties.</td>
</tr>
<tr>
<td>46</td>
<td>FWA should be able to make costs orders against lawyers or paid agents involved in unfair dismissal applications irrespective of whether FWA has granted them permission to represent a party in the application.</td>
<td>Further consideration is required as to the potential effects of this recommendation.</td>
</tr>
</tbody>
</table>
General Protections

The Barclay decision

The ACTU strongly opposes the Panel’s recommendation that the central consideration about the reason for adverse action in a general protections case should be the subjective intention of the person taking the alleged adverse action.

This recommendation would effectively overturn the decision of *Barclay v Bendigo Regional Institute of TAFE*[^56], which is currently on appeal to the High Court of Australia. In that case, a majority of the Full Federal Court found that while the state of mind or subjective intention of an employer is centrally relevant to whether or not they have contravened a general protection, it does not determine whether the employer acted for a prohibited reason. Rather, what determines whether the employer has acted for a prohibited reason is the ‘real reason’ behind the employer’s conduct, which may be conscious or unconscious. Further, the decision found that where the real reason is unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator has a benevolent intent[^57].

A move to legislate away the Full Court decision in *Barclay* would seriously undermine the efficacy of the general protections provisions.

The recommendation is particularly troubling when seen in the context of the facts of the *Barclay* case. The central controversy of that case involved an employee, Mr Barclay, who was a delegate of his union. Mr Barclay was representing the interests of his colleagues when he emailed union members in his capacity as a union delegate. In response, his employer took adverse action by suspending him from his employment and denying him internet access at the workplace.

In a decentralised bargaining system which is heavily dependent for its effective functioning on the willingness of people to volunteer to represent the interests of their fellow workers, it is imperative that delegates are adequately and effectively protected. By contrast, the effect of the recommendation may enable a person who has broken the law by unlawfully discriminating against someone to escape liability merely by relying on a defence in which they simply deny the allegation.

[^56]: [2011] FCAFC 14
[^57]: Ibid, at [28]
Moreover, it is apparent from a number of recent decisions that the hysterical employer claims that future general protections claims brought by union delegates would be ‘almost impossible to defend’ as a result of the decision

It is important to note that the approach of the Full Federal Court in Barclay is also consistent with anti-discrimination law which suggests that people may act for reasons that they are unaware of or refuse to admit to themselves (or to the court) such as unconscious prejudice.

It is not the place of the Panel to overturn this important decision simply because it ‘prefers’ the approach of the dissenting judge. The ACTU will vigorously oppose the recommendation.

Sham Contracting

In its submissions to the review Panel, the ACTU strongly argued for the strengthening of sham contracting provisions in the FW Act.

The Panel’s recommendation would mean that employers would only have a defence to the prohibition on misrepresentations concerning sham contracting where they can prove that, at the time the representation was made, they believed that the contract was one for services rather than a contract of employment, and could not reasonably have been expected to know otherwise. The recommendation does not go far enough.

Sham contracting is getting out of control. In its submissions to the review Panel the ACTU notes ABS reports that there are 1.1 million contractors, yet 40% of them admit that they have ‘no control’ over their own work, which amounts to an admission that they are probably, at law, employees. Many jobs (that are clearly ‘employment’ rather than ‘contract’ jobs) are now openly advertised in newspapers and on websites as ‘ABN required’. Many consultancies sell off-the-shelf kits to employers, instructing them how to convert their workers from employees to contractors, and thereby purporting to avoid labour law and superannuation obligations. Sham contracting is also driving tax evasion. It is clear that the current provisions, which are relics of the Work Choices era, are failing to deal with the growing problem of sham contracting. The current provisions only make it unlawful for an employer to knowingly misrepresent an employment relationship as a contracting arrangement, however the common law test for what constitutes an ‘employment’ relationship is

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58 See, for example, *Fair Work Legislation Review*, Australian National Retailers Association, February 2012, at p28; and *Removing the Barriers to Productivity and Flexibility: Submission to the Fair Work Act Review*, Ai Group, February 2012 at p104
59 See, e.g. *Fair Work Act Review: Submission by Anthony Forsyth and Andrew Stewart* at p36
60 *Op cit n2 at p237; and Submission to the Fair Work Act Review*, Centre for Employment and Labour Relations Law (CELRL) at p8
62 See ACTU submissions to the review, *op cit n3* at p50
63 Ibid
so vague that most employers can successfully plead that they made an honest mistake, or claim that they relied on legal or consulting advice to avoid liability.

Therefore, while this recommendation would be an improvement on the current provisions in the FW Act, it is insufficient to tackle the problem of sham contracting. Rather, the ACTU strongly believes that sham contracting itself should be unlawful.

Time limit for lodging general protections applications

Consistent with the ACTU’s position on the Panel’s recommendation relating to the time limit for filing general protections claims, we support the alignment of the time limits relating to unfair dismissal and general protections claims. However, the more appropriate time limit for both is 60 days, rather than 21.

The 60-day period is required in order to ensure that applicants have adequate time to seek legal advice on their options. This is particularly the case in circumstances where general protections matters, if not settled at conciliation before FWA (for general protections applications involving termination of employment), are resolved before the more formal and more costly Federal Magistrates Court or Federal Court. Reducing the current 60-day period to 21 days would mean that employees would have less than half the time currently available to them to consider making applications which are far more complex, formal, and costly than those made in the unfair dismissal regime.

Summary of the ACTU’s response to the Panel’s recommendations relating to General Protections

<table>
<thead>
<tr>
<th>No</th>
<th>Recommendation</th>
<th>ACTU Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>47</td>
<td>In General Protections applications, the central consideration about the reason for adverse action should be the subjective intention of the person taking the alleged adverse action.</td>
<td>The ACTU strongly opposes this recommendation. It would seriously undermine the intent and efficacy of the General Protections, and may enable a person who has broken the law by unlawfully discriminating against someone to escape liability merely by denying it.</td>
</tr>
<tr>
<td>48</td>
<td>Employers should not have a defence to misrepresentations concerning sham contracting unless the employer proves that they believed the contract was a contract for services and could not reasonably have been expected to know otherwise.</td>
<td>This recommendation would mark an improvement to the current provisions, however the ACTU strongly believes that sham contracting itself should be unlawful.</td>
</tr>
<tr>
<td>49</td>
<td>General Protections claims that relate to dismissals should be lodged within 21 days.</td>
<td>The ACTU supports alignment of the time limits between unfair dismissal claims and general protections claims, however the time limit of 60</td>
</tr>
<tr>
<td>days is more appropriate to ensure applicants have adequate time to get legal advice on their options.</td>
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</tbody>
</table>
Fair Work Australia and Fair Work Ombudsman

One of the most important contributions made by the FW Act was restoring the role of an independent umpire. The ACTU supports the recommendations made in relation to FWA.

However, no recommendations have been made in relation to FWO.

In our submission to the review the ACTU noted a number of concerns in relation to FWO which we continue to hold, and which the Panel has not addressed. Specifically:

- the experience of unions has been that FWO advice sometimes conflicts with longstanding industrial understanding and practice. The ACTU encourages the FWO to ensure that advice provided is consistent with the views of the industrial parties, particularly in relation to award content;

- FWO’s resources would best be utilised assisting un-unionised employees to enforce their workplace rights. Investigations which relate to unprotected industrial action are best left to FWA or the courts to resolve; and

- FWO should have the ability to enforce superannuation obligations. Currently, FWO regards superannuation as a matter for the ATO.

The ACTU will continue to push for these reforms to ensure a functional and effective FWO.

Summary of the ACTU’s response to the Panel’s recommendations relating to FWA and FWO

<table>
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<tr>
<th>No</th>
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</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>Fair Work Australia’s name should be changed. It should be called a Commission and it should not have the words “Fair Work” in the title.</td>
<td>The ACTU supports this recommendation</td>
</tr>
<tr>
<td>51</td>
<td>The General Manager should be nominated by the President before being appointed by the Governor General.</td>
<td>The ACTU supports this recommendation</td>
</tr>
<tr>
<td>52</td>
<td>The President or a Deputy President should be permitted to stay the operation of a decision under appeal or a review, whether or not that Tribunal member is a member of the Full Bench</td>
<td>The ACTU supports this recommendation</td>
</tr>
<tr>
<td>hearing the relevant appeal or review.</td>
<td>The Governor General should also be able to appoint Acting Commissioners under the current procedure that permits Acting Deputy Presidents to be appointed.</td>
<td>The ACTU supports this recommendation</td>
</tr>
<tr>
<td>No.</td>
<td>Recommendation</td>
<td>ACTU Response</td>
</tr>
<tr>
<td>-----</td>
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</tr>
<tr>
<td>1</td>
<td>The role of Fair Work Institutions should be extended to include the active encouragement of more productive workplaces.</td>
<td>The ACTU has no opposition to government agencies providing information and assistance to bargaining parties in developing agreed processes to consult, and to work in partnership to improve productivity. We note that the President of FWA has already announced some steps the Tribunal intends to take in this regard in consultation with the ACTU and employer groups.</td>
</tr>
<tr>
<td>2</td>
<td>Employees should not accrue annual leave while they are receiving workers’ compensation.</td>
<td>The ACTU opposes this recommendation.</td>
</tr>
<tr>
<td>3</td>
<td>An employer should meet with an employee who has requested extended unpaid parental leave and discuss their request.</td>
<td>The ACTU supports an amendment to the legislation which would require an employer to give due consideration to a request. However, the discussion needs to be underscored by an effective right of review where the request is refused.</td>
</tr>
<tr>
<td>4</td>
<td>The taking of unpaid special maternity leave should not reduce the amount of unpaid parental leave available.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>5</td>
<td>The right to request flexible working arrangements should be extended to a wider range of caring and other circumstances, and an employer should meet with an employee who has requested flexible working arrangements and discuss their request, unless the employer has agreed to the request.</td>
<td>The ACTU supports an amendment to the legislation which would require an employer to give due consideration to a request. However, the discussion needs to be underscored by an effective right of review where the request is refused.</td>
</tr>
<tr>
<td>6</td>
<td>Annual leave loading should not be payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.</td>
<td>The ACTU opposes this recommendation. Annual leave loading should be payable on termination of employment unless an enterprise agreement expressly provides to the contrary.</td>
</tr>
<tr>
<td>7</td>
<td>Commonwealth, State and Territory Governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015.</td>
<td>The ACTU welcomes the involvement of union and employer group representatives in tripartite discussions of a national long service leave standard.</td>
</tr>
<tr>
<td>8</td>
<td>The number of public holidays under the NES on which penalty rates are payable should be limited to a nationally consistent number of 11.</td>
<td>Penalty rates should be available on all public holidays in accordance with Modern Awards and Enterprise Agreements.</td>
</tr>
<tr>
<td>9</td>
<td>The better off overall tests for enterprise flexibility agreements should be amended to expressly permit IFAs to</td>
<td>The ACTU opposes this recommendation.</td>
</tr>
<tr>
<td>10</td>
<td>The employer should be required to notify the Fair Work Ombudsman in writing when an individual flexibility arrangement is made.</td>
<td>While transparency and records of IFAs made would be valuable, this may not be an appropriate role for the FWO.</td>
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<tr>
<td>11</td>
<td>If an employer notifies the Fair Work Ombudsman of the IFA and “believes on reasonable grounds” that all other requirements in relation to the IFA have been met, they have a defence against prosecution for contravention of the flexibility term.</td>
<td>This ACTU opposes this recommendation.</td>
</tr>
<tr>
<td>12</td>
<td>The notice period for the termination of an IFA should be 90 days rather than 28.</td>
<td>This ACTU opposes this recommendation.</td>
</tr>
<tr>
<td>13</td>
<td>The sections of the Act that deal with flexibility terms under awards and agreements should include the prohibition on making an offer of employment conditional on entering into an individual flexibility arrangement.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>14</td>
<td>Clearer powers for Fair Work Australia to strike out award variation applications that are not made in accordance with the Act, are frivolous, vexatious or have no reasonable prospects of success.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>15</td>
<td>Parties with standing to make applications to vary award terms, including industrial organisations that represent persons covered by the award, should have standing to make applications to vary the award to remove ambiguity or uncertainty, or to correct an error.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>16</td>
<td>An applicant for a scope order should only be required to take all reasonable steps to notify relevant bargaining representatives of the concerns that have led them to make the application.</td>
<td>The preferable solution would be to require the employer to let all bargaining representatives know who the other bargaining representatives are, and how to contact them.</td>
</tr>
<tr>
<td>17</td>
<td>Applications should be able to be made for bargaining orders where bargaining</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>18 Good faith bargaining obligations should apply to proposed variations of enterprise agreements.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
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</tr>
<tr>
<td></td>
<td>19 Notices of representational rights should include only the matters required by the Act and the Regulations.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>20 Notices of representational rights should be lodged with Fair Work Australia and published on its website.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>21 Individual union officials should not be permitted to act as bargaining representatives for workers where the union they are an official off does not have coverage for those workers.</td>
<td>The ACTU supports this recommendation which is consistent with Draft ACTU policy in relation to coverage and demarcation.</td>
</tr>
<tr>
<td></td>
<td>22 Fair Work Australia should have the power to intervene in bargaining and greenfields negotiations on its own motion where it considers conciliation could assist.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>23 Agreement clauses that permit employees to opt out of the agreement should be prohibited.</td>
<td>The ACTU strongly supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>24 Every enterprise agreement should be required to include a flexibility term that at a minimum enables individual flexibility agreements to be made concerning arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading,</td>
<td>The ACTU strongly opposes this recommendation.</td>
</tr>
<tr>
<td></td>
<td>25 The Government should continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.</td>
<td>The BOOT is operating effectively to protect workers.</td>
</tr>
<tr>
<td></td>
<td>26 The Act should prohibit the making of an enterprise agreement with one employee.</td>
<td>The ACTU strongly supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>27 Good faith bargaining obligations should apply to greenfields negotiations, with any necessary modifications</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>28 Employers intending to negotiate a greenfields agreement should be required to take all reasonable steps to notify all unions with eligibility to represent relevant employees.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td></td>
<td>Recommendation</td>
<td>ACTU Support/Comment</td>
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</tr>
<tr>
<td>29</td>
<td>FWA should be allowed to deal with bargaining disputes under s240 in relation to greenfields agreements</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>30</td>
<td>Where greenfields negotiations reach 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.</td>
<td>While the ACTU recognises that there are some situations where arbitration may be warranted as last resort, we would welcome a more balanced set of remedies that extend to deadlocks where parties are bargaining for their first agreement or where surface bargaining is occurring.</td>
</tr>
<tr>
<td>31</td>
<td>Protected industrial should be unavailable unless the employer has agreed to bargain or there is a majority support determination in place.</td>
<td>The ACTU strongly opposes this recommendation.</td>
</tr>
<tr>
<td>32</td>
<td>The provisions of the Act dealing with protected industrial action should be amended to:</td>
<td>While positive, this recommendation requires further consideration in relation to collateral effects.</td>
</tr>
<tr>
<td></td>
<td>(a) Allow protected action ballots to be conducted by electronic voting;</td>
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<tr>
<td></td>
<td>(b) Allow an employee who becomes a member after a ballot order to be included on the roll of voters, and to vote on and take protected industrial action;</td>
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<tr>
<td></td>
<td>(c) Allow an employee bargaining representative who is a union member to be included in the group of employees to be balloted pursuant to a ballot order obtained by the employees union, and to vote on and take protected industrial action;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(d) Require Fair Work Australia to ensure that ballot agents conduct ballots expeditiously;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(e) If the group of employees to be covered by a proposed agreement includes employees covered by an agreement that has not passed its nominal expiry date, allow the remaining employees to be the subject of a ballot order and to vote on and take protected industrial action.</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>The Act should be amended to provide that the provision of accommodation does not constitute ‘payment’, such that employers should continue to be required to provide accommodation even if employees are taking industrial</td>
<td>The ACTU supports this recommendation.</td>
</tr>
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</tr>
<tr>
<td>34</td>
<td>The Minister’s power to make a declaration to terminated protected industrial action should be repealed.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>35</td>
<td>Fair Work Australia should have greater power to resolve disputes about the frequency of visits to a workplace by a permit holder exercising right of entry.</td>
<td>The ACTU would welcome Fair Work Australia intervention to end the practice of employers requiring union officials to attend workplaces on successive days in order to visit different groups of workers. However we oppose giving Fair Work Australia power to restrict the legitimate exercise of the rights conferred by the legislation.</td>
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<tr>
<td>36</td>
<td>Fair Work Australia should have greater power to resolve disputes about the location of interviews and discussions with permit holders exercising right of entry.</td>
<td>The ACTU would welcome Fair Work Australia intervention to ensure that permit holders exercising their entry rights under Act are able to access the areas of the workplace where workers choose to congregate.</td>
</tr>
<tr>
<td>37</td>
<td>Permit holders should have some capacity to exercise right entry to investigate suspected contraventions relating to a member who is no longer an employee.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>38</td>
<td>Where employees seek on their own initiative to transfer to a related entity of their current employer, their employment should be subject to the terms and conditions provided by the new employer and there should be no transfer of business.</td>
<td>The ACTU does not support this recommendation.</td>
</tr>
<tr>
<td>39</td>
<td>Employees should have access to unfair dismissal if the fixed period or specified task or seasonal nature of their employment contract was devised to attempt to avoid the unfair dismissal system.</td>
<td>The ACTU supports this recommendation.</td>
</tr>
<tr>
<td>40</td>
<td>The time limit for lodging an unfair dismissal claim should be 21 days (increased from 14 days).</td>
<td>The ACTU supports alignment of the time limits between unfair dismissal claims and general protections claims, however the time limit of 60 days is more appropriate to ensure applicants have adequate time to get legal advice on their options.</td>
</tr>
<tr>
<td>41</td>
<td>Fair Work Australia should be empowered to deal with unfair dismissal applications through a hearing process that is informal, inquisitorial and determinative.</td>
<td>The ACTU would support an informal process subject to ensuring procedural fairness and the retention of existing appeal rights.</td>
</tr>
<tr>
<td>42</td>
<td>Fair Work Australia should have discretion to dismiss unfair dismissal applications where the parties have concluded a settlement agreement, where an applicant fails to attend a proceeding relating to the application, or where the application fails to comply with FWA directions or orders relating to the application.</td>
<td>FWA processes and procedures should not impose a higher standard on sacked workers than on the top end of town.</td>
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<tr>
<td>43</td>
<td>FWA should be able to exercise its powers to dismiss unfair dismissal applications without holding a hearing, but should invite the parties to provide further information before exercising these powers.</td>
<td>Appropriate safeguards are required to ensure that there is procedural fairness when dismissing any application.</td>
</tr>
<tr>
<td>44</td>
<td>The President of FWA should consider requiring applicants to provide more information about their dismissal in the initial documentation lodged with FWA.</td>
<td>The ACTU supports this recommendation provided that the requirements are not unduly onerous on unrepresented parties.</td>
</tr>
<tr>
<td>45</td>
<td>The costs provisions for unfair dismissal should allow FWA to make an order for costs against a party that has unreasonably failed to discontinue a proceeding, or unreasonably failed to agree to terms of settlement that could have led to the discontinuing the application, or that has through an unreasonable act or omission caused the other party to incur costs.</td>
<td>The ACTU supports this recommendation provided the requirements are not unduly onerous on unrepresented parties.</td>
</tr>
<tr>
<td>46</td>
<td>FWA should be able to make costs orders against lawyers or paid agents involved in unfair dismissal applications irrespective of whether FWA has granted them permission to represent a party in the application.</td>
<td>Further consideration is required as to the potential effects of this recommendation.</td>
</tr>
<tr>
<td>47</td>
<td>In General Protections applications, the central consideration about the reason for adverse action should be the subjective intention of the person taking the alleged adverse action.</td>
<td>The ACTU strongly opposes this recommendation. It would seriously undermine the intent and efficacy of the General Protections, and may enable a person who has broken the law by unlawfully discriminating against someone to escape liability merely by denying it.</td>
</tr>
<tr>
<td>48</td>
<td>Employers should not have a defence to misrepresentations concerning sham contracting unless the employer proves that they believed the contract was a contract for services and could not reasonably have been expected to know otherwise.</td>
<td>This recommendation would mark an improvement to the current provisions, however the ACTU strongly believes that sham contracting itself should be unlawful.</td>
</tr>
<tr>
<td>49</td>
<td>General Protections claims that relate to dismissals should be lodged within 21 days.</td>
<td>The ACTU supports alignment of the time limits between unfair dismissal claims and general protections claims, however the time limit of 60 days is more appropriate to ensure applicants have adequate time to get legal advice on their options.</td>
</tr>
<tr>
<td>50</td>
<td>Fair Work Australia’s name should be changed. It should be called a Commission and it should not have the words “Fair Work” in the title.</td>
<td>The ACTU supports this recommendation</td>
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<tr>
<td>51</td>
<td>The General Manager should be nominated by the President before being appointed by the Governor General.</td>
<td>The ACTU supports this recommendation</td>
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<td></td>
<td>The President or a Deputy President should be permitted to stay the operation of a decision under appeal or a review, whether or not that Tribunal member is a member of the Full Bench hearing the relevant appeal or review.</td>
<td>The ACTU supports this recommendation</td>
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<tr>
<td>53</td>
<td>The Governor General should also be able to appoint Acting Commissioners under the current procedure that permits Acting Deputy Presidents to be appointed.</td>
<td>The ACTU supports this recommendation</td>
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</table>