"One Out

the **Abbott Government** and the return of unfair individual contracts"

ACTU
australian council of trade unions

Australian Unions
Join. For a better life.

Foreword

Along with removing unfair dismissal protections and gutting the power of the independent umpire, the signature element of WorkChoices was unfair individual contracts called Australian Workplace Agreements (AWAs). AWAs were a key reason that the Australian people rejected the WorkChoices regime.

In the last year or so that WorkChoices was in operation, around 1000 workers a day were being put on AWAs. An enormous number of these contracts were deeply unfair to working people. Around 70% removed shift loadings and annual leave loading, 65% removed penalty rates, half removed public holiday penalties and overtime pay and nearly a third removed rest breaks.

There is a myth that AWAs were handcrafted, bespoke, arrangements 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, template, take it or leave it offers, handed out at hiring or used to get workers to individually concede to things that they would not agree to collectively. In reality there were two types of AWAs although sometimes they overlapped – the ones that cut pay and conditions and the ones used as part of a de-unionisation push.

Labor's Fair Work Act abolished AWAs. The ability to tailor working conditions is included in Modern Awards, Enterprise Agreements and a mechanism called Individual Flexibility Agreements (IFAs). Crucially, the IFA process includes a series of procedural and substantive requirements designed to protect workers.

Now, these protections are under threat. This paper analyses an attempt by the Abbott government to restore many of the worst aspects of AWAs by amending the legislation that governs IFAs.

It is difficult to believe that, less than 7 years after they lost a Federal election in which unfair IR arrangements were a very significant factor, the Coalition is back to its old tricks.

Yet, as this analysis demonstrates that's exactly what is happening.

Australian Unions have had to organise and campaign to defeat these sorts of unfair individual contracts before. And we will do it again.

Tim Lyons
Assistant Secretary

Contents

1. Summary of findings

This paper examines the likely impacts of the Coalition government's proposed new industrial relations legislation concerning individual employment agreements, by reference to the recent experience of individual bargaining mechanisms available under the *Fair Work Act* and the *Workplace Relations Act*. This comparative analysis demonstrates that:

- Individual bargaining under the *Workplace Relations Act* resulted in the exploitation of workers;
- The limited safeguards to individual bargaining which were introduced by the *Fair Work Act* have proven to be largely ineffective and poorly observed;
- Legal mechanisms currently exist in the *Fair Work* Act to compensate workers if exploitative agreements are made unlawfully in breach of those safeguards;
- The Government's proposals deliberately undermine those legal mechanisms and the safeguards that give rise to them;
- The Government's proposals extend beyond what the Coalition disclosed in its pre-election policy and will serve to increase the incidence of exploitation.

2. Introduction

On the 27th of March 2014 the Government introduced legislation in order to implement elements of the Coalition's industrial relations policy and various recommendations made by the Fair Work Review Panel ("the Panel").

The *Fair Work Amendment Bill 2014* ("the Bill") contains a range of amendments to the Fair Work Act ("the Act") that will have a detrimental impact on Australian workers and their families.

The ACTU believes that the Bill goes well beyond the public policy position that was outlined by the Government prior to the 2013 election and seeks to bring back key elements of the WorkChoices regime. In particular, the Bill opens the way for a return to the most insidious aspects of individual statutory arrangements which were seen under WorkChoices and were emphatically rejected by Australians in 2007. The Bill systematically dismantles the protections inserted by the Act which were designed to ensure that legitimate flexibility is exercised in a way which is not detrimental to employees.

The Act currently provides that modern awards and enterprise agreements must include a "flexibility term". A flexibility term enables an employee and his or her employer to agree to an Individual Flexibility Arrangement ("IFA"). An IFA varies the effect of particular terms of the applicable award or enterprise agreement in order to meet the genuine needs of the parties. The content of the flexibility term is regulated by the Act, for example the Act requires that the flexibility term set out the terms of the award or the agreement that may be varied by an IFA.

The proposed amendments directly affect what the flexibility term in awards and agreements will look like, how it will work and how IFAs are enforced and terminated. These amendments undermine a number of safeguards that were designed to address significant problems associated with Australian Workplace Agreements ("AWAs") and which sought to ensure that IFAs could not be used by employers to exploit vulnerable employees or drive down wages or conditions of employment.

This paper provides an analysis of the proposed amendments to the Act with respect to IFAs and the flexibility terms under which they will be made. In order to properly understand the consequences of these changes, it is necessary to briefly revisit the operation of AWAs and the effect that these arrangements had on terms and conditions of employment – hence the next chapter of this paper focuses on individual bargaining under WorkChoices. Chapter 4 outlines the current provisions of the Act and the ineffectiveness of existing safeguards on the operation of IFAs. Chapter 5 discusses the specific amendments contained in the Bill and their likely effect on employees' working conditions.

3. Individual Bargaining under WorkChoices

Individual statutory contracts, known as AWAs, were first introduced by the Workplace Relations Act.

AWAs operated to the exclusion of the relevant award or enterprise agreement and, following the implementation of WorkChoices, could apply for a period of up to 5 years.

The "no disadvantage test", which ensured that AWAs did not on balance disadvantage an employee compared to the relevant award, was abolished under WorkChoices and replaced with five minimum standards known as the Australian Fair Pay and Conditions Standard (**AFPCS**). These five standards were: a minimum hourly rate, 4 weeks' annual leave per year (2 weeks of which could be 'cashed out'), 10 days sick/carer's leave, a 38 hour working week (which could be averaged over a 12 month period in order to avoid payment of overtime rates for additional hours worked); and 52 weeks' unpaid parental leave. Other award entitlements were no longer 'protected' by law. Consequently an AWA could be made that stripped away basic award conditions, such as penalty and overtime rates, allowances and consultation rights.

The absence of unfair dismissal protections for workers of businesses with less than 100 employees and the introduction of 'operational reasons' as an insurmountable ground for dismissal enabled businesses to dismiss employees that refused to accept an AWA and replace them with employees on lower wages and conditions.

In addition, workers could be compelled to accept an AWA that removed entitlements as a condition of employment or promotion[1]. There was clearly no real choice on the part of an employee seeking a job whether or not to accept an AWA. The existence of a collective agreement under these arrangements offered very little protection against coercion or undue pressure being applied to individual employees to accept an AWA. WorkChoices permitted employers to undercut bargained entitlements by systematically implementing AWAs with individual employees.

The rhetoric of 'individual flexibility' for workers was used to promote AWAs. However, in practice, AWAs provided employers with an extremely effective means of avoiding their legal obligations, undermining the safety net and exploiting vulnerable employees.

---

[1] *Workplace Relations Act* 1996, section 400(6).

At the end of December 2007, the Workplace Authority estimated that around 880,000 employees (9.6%) were on AWAs.[2] The majority of AWAs were made with employees in low paid sectors of the economy. The retail, hospitality and personal services sectors accounted for 55% of all AWAs lodged[3] , which are sectors where the level of dependency on the award safety net has traditionally been and remains at high levels[4].

Analysis of a sample of 250 AWAs (out of 6263 lodged between 27 March and 30 April 2006) shows that all AWAs removed at least one protected award condition and 16% excluded all protected award conditions.[5]

Further data compiled by the Workplace Authority shows that 89% of the 1,748 AWAs lodged between April and September 2006 removed at least one protected award condition, 71% excluded four or more, 52% excluded six or more and 2% excluded all protected award conditions. The protected conditions that were removed by AWAs included:

- penalty rates (65%);
- annual leave loading (68%);
- shift work loadings (70%);
- overtime loadings (49%);
- State/Territory public holidays (25%);
- days off work as a substitute for working on a public holiday (61%);
- public holiday penalties (50%);
- rest breaks (31%);
- allowances (56%); and
- bonuses (63%).[6]

The rate at which conditions were being removed was substantially higher under WorkChoices AWAs than under pre-Work Choices AWAs and overtime and penalty rates were particular targets

---

[2] Lodgement Data cited in the Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

[3] Workplace Authority, 'Lodgement Data: 27 March 2006–30 September 2007' (2007) p 5.

[4] ABS data (6306-May 2012) indicates that 63.9% of award dependent employees are engaged in the accommodation and food services, retail trade, Health care and social assistance and administrative and support services industries.

[5] Report of the Fair Work Act Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", 2012, p 119.

[6] The Hon Julia Gillard MP, AWA Data the Liberals claimed never existed, media release, 20 February 2008. Note that the media release relied upon Office of the Employment Advocate data examined between April and October 2006.

for removal. In the case of overtime pay, the rate at which it was removed through AWAs doubled from a quarter of AWAs in 2002-03 to over a half of AWAs in 2006.[7]

Employers commonly used AWAs to increase hours of work. The average AWA employee worked a 13% longer week than their peers employed under a collective arrangement.[8] Often employees on AWAs worked longer hours for less pay. For example in New South Wales, female AWA employees worked 4.4% longer hours than their counterparts engaged under collective agreements, but earned 11.2% less.[9]

It was also common practice not to provide any wage increase over the life of the AWA. 22% of AWAs in April 2006 contained no provision for a wage increase during the life of the agreement and this figure rose to 34% in April-September 2006.[10]

In industries where award wages were not a good reflection of market wages, the wage loss suffered by a typical worker can be inferred by comparing AWA wages to the wages payable to workers employed under collective agreements. In 2006, the median AWA worker earned 16.3% less per hour than the comparable worker on a collective agreement.[11]

In award-dependent industries, the removal of minimum conditions resulted in average wage outcomes for some workers that were even lower than the minimum award rate. For example, in the hospitality industry, average AWA earnings in 2004 and 2006 were 1.8% and 1.6% below average earnings of workers reliant on the award minimum respectively.[12]

Employees most negatively affected by AWAs included women, low-skilled workers, employees in small firms and workers with little bargaining power. Women on AWAs earned less than women on collective agreements in every state, by margins ranging from 8% to 30%[13] and female casual workers on AWAs received average earnings some 7.5% below average award earnings.[14]

The experience of AWAs clearly demonstrates that the assumption of a level playing field where employees negotiate wages and conditions with their employers is a myth. Employees face a significant power imbalance that affects all aspects of the employment relationship. They were, and are, likely to be unaware of their rights in relation to individual statutory contracts especially their right to refuse to make an agreement, and are not always well placed to make an assessment of whether an arrangement disadvantages them.

---

[7] David Peetz and Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data' (2007) p 4.
[8] ABS cat 6306.0 (May 2006) p 33.
[9] ABS cat 6306.0 (May 2006) Table 10.
[10] David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 64.
[11] Peetz and Preston, p 13.
[12] David Peetz, Submission to the Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, (2008), p 67.
[13] Ibid, p 29.
[14] Ibid, p 67.

Employees are generally reluctant to challenge their employer, either by opposing the making of an agreement at the employer's insistence, or else in seeking compensation for disadvantage suffered under the terms of an agreement. Unless an employee is supported by a union, has skills which are in demand or is an unusually confident and assertive individual, it is unlikely that an employee would have been able to negotiate fair terms and conditions of employment.

On the other hand, it is overwhelmingly employers who initiate the use of individual statutory agreements. Employers seek agreements that provide them with increased discretion to set the terms and conditions of work. They commonly provide inadequate compensation for the removal of monetary entitlements particularly where there is no external assessment of the sufficiency of the compensation, and generally offer no compensation for non-monetary disadvantage suffered by the employee such as the employee's increased subjection to the exercise of managerial discretion. Employers will apply pressure to employees to accept their preferred agreement especially if they are permitted to make 'take it or leave it' offers to new employees, and some employers may apply pressure amounting to coercion even though this would be unlawful.

Non-compliance with employment obligations and lack of enforcement by employees is particularly prevalent in industries where the employer is under competitive pressure to reduce labour costs such as sections of the manufacturing, hospitality and retail industries. Such non-compliance particularly effects vulnerable workers including young workers, women, those working in precarious employment, outworkers and employees working in workplaces without a union presence.

4. Individual Bargaining under the Fair Work Act

When the Act was introduced, a number of important safeguards on the operation of IFAs were included. The Act requires that IFAs:

- must be genuinely agreed to by both parties; [15]
- must pass the "Better Off Overall Test" (BOOT), meaning that the IFA must result in the employee being better off overall than they would have been had no agreement been made;[16]
- can only be made after the employee has commenced employment;[17]
- must be in writing and be signed by the employee and the employer. If the employee is under 18, the IFA must also be signed by a parent or guardian. The employer must ensure that a copy of the IFA is given to the employee;[18]
- may be terminated by either party giving written notice or immediately if the parties agree.[19]

The content of an IFA must also comply with the flexibility term contained in relevant modern award or enterprise agreement. The model flexibility term contained in all modern awards limits the award provisions that can be varied by an IFA to the following matters: arrangements about when work is performed; overtime rates; penalty rates; allowances and leave loading.[20]

The terms that may be included in an IFA varying the effect of an enterprise agreement is a matter for bargaining. The Act requires all agreements to contain a flexibility clause that sets out which matters may be the subject of an IFA.[21] If the enterprise agreement does not include a flexibility term, the model flexibility term in the Fair Work Regulations is taken to be a term of the agreement.[22] The model agreement flexibility term contains the same matters as model award flexibility term.

Unions did not support the introduction of IFAs, notwithstanding the formal safeguards that accompanied them. The concern was that, in practice, some or all of these safeguards would not be observed or effective. Indeed, over the period of operation of the Act it has become apparent that in spite of these safeguards IFAs are being used by employers in a similar fashion to AWAs – that is, to drive down wages and conditions and exploit vulnerable employees.

---

[15] s144(4)(b), 203(3).
[16] s144(4)(c), 203(4).
[17] s144(4)(d), Modern award clause 7.2.
[18] s144(4)(e), 203(7).
[19] s144(4)(d), 203(6).
[20] Modern award clause 7.2.
[21] 203(2)(a).
[22] 203(4),203(5).

The most comprehensive source of data on IFAs to date is the report of the General Manager of Fair Work Australia, published in November 2012. [23] The report contains an analysis of the extent to which IFAs are agreed to and the content of those arrangements. Sources used to inform the report include:

- a survey of 2650 employers across a range of locations, employer sizes and industries;
- a survey of 4500 employees from across Australia, sources from a range of industries;
- qualitative analysis of IFAs submitted to the general manager by employers; and
- submissions from interested parties.

The responses provided by survey participants confirm that employers are generally better informed than employees about the provisions of the Act with respect to agreement making and are well placed to control the agreement making process:

- 54% of all employers are 'aware that employers can have an IFA with an employee that varies the effect of the modern award or an enterprise agreement that applies to an employee', compared with 35% of employees.[24]
- Employers reported that most reviews, modifications and terminations of IFAs were employer-initiated (around 70%).[25]
- The drafting process is largely controlled by employers. 85-88% of employers are involved in drafting the content of IFAs compared with approximately 36-38% of employees.[26]
- Multiple IFA employers also commonly receive assistance from employer associations and external consultants, particularly in relation to IFAs that vary the effect of a modern award.[27]

More significantly, the research reveals that IFAs are being used in a manner that is expressly prohibited by the Act:

- The majority of multiple IFA employers (54%) admitted that they required all employees to sign IFA documentation to either commence or continue their employment.[28]
- For employers that had made an IFA with only one employee, around 35% indicated they had required an employee to sign the IFA to commence or continue employment.[29] Such

[23] General Manager's Report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012, (2012).
[24] Figure 4.1, Table 4.1.
[25] Table 4.4, Table 4.7
[26] Table 4.3, Table 4.6.
[27] Table 4.6.
[28] Table 4.6.
[29] Table 4.3.

conduct is inconsistent with the requirement that the employer and individual employee must have 'genuinely agreed' to make the IFA, without coercion or duress.

- Participants in the employer survey were asked if they had assessed whether their employees were better off overall as a result of their IFA. The results show that a significant proportion of employers made no effort to comply with their legal obligation to do so. 18% of single IFA employers and 27% of multi-IFA employers reported that they did not assess whether the employee was better off overall. [30]
- Participants in the employee survey were asked whether they considered themselves to be better off overall as a result of the IFA. Not surprisingly, a significant proportion (17%) reported that they did not consider themselves to be better off overall.[31]

These findings highlight the fact that existing safeguards on the use of IFAs are relatively ineffectual as a means of protecting employees. The absence of external scrutiny in relation to the content of IFAs and the process of making them enables employers to pressure employees to accept substandard IFAs that reduce wages and conditions.

The ACTU believes that the findings contained in the report tend to understate the extent to which IFAs are being utilised to exploit employees. For obvious reasons, employers that are aware of their legal obligations may be inclined to disguise non-compliance. On the other hand, it is likely that a significant number of employees surveyed may be unaware that an IFA removes entitlements contained in a modern award or enterprise agreement.

Since the Act was enacted, there have been numerous reports of IFAs that clearly disadvantage employees compared to the relevant award or enterprise agreement.

For example in 2011, United Voice sued the Spotless Group over two suspect IFAs. 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. They received no compensation, except 'the opportunity to earn a higher income'. The matter was settled and the union is party to a Deed of Release that prohibits discussion of the substance of the Deed or the circumstances surrounding the settlement. Nevertheless, the statement of claim outlining the allegations against Spotless is a matter of public record and provides evidence of the kinds of IFAs that exist.

Another specific example relates to offers made by Medibank Private to its employees to work from home on the condition that the employee agrees to forgo the entitlement to overtime rates under the terms of the relevant collective agreement.

---

[30] Table 5.5, Table 5.7.
[31] p 71.

Such arrangements clearly do not pass the Better Off Overall Test (**BOOT**). Yet employer organisations frequently assert that non-monetary entitlements such as arrangements that provide 'the opportunity to earn extra income' or that otherwise 'meet employee needs' can be used to offset the loss of financial entitlements such as penalties and loadings.

Anecdotal evidence suggests that the use of IFAs to remove award entitlements is prevalent in low-paid industries such as the cleaning, aged care, and disability sectors where workers are highly dependent on the award safety net. The ACTU understands that in these industries IFAs are commonly used to alter penalty rates, overtime pay and allowances or modify award provisions that regulate hours of work, for example by removing minimum engagement provisions or increasing the maximum number of days that an employee can work consecutively without payment of overtime.[32]

There have also been a number of high profile cases which demonstrate that unfair practices persist. An audit conducted by the Fair Work Ombudsman in 2011 to assess the level of award compliance in the Queensland Pharmacy Industry confirmed the use of what appeared to be a 'standardised' or template-driven IFAs being used by a small number of employers. As the report notes, the template approach raises questions as to whether the IFAs were produced following genuine negotiation. [33] Moreover, such an approach does not demonstrate an appetite by the employer for flexibility, but rather a preference for all employees to be on identical conditions of employment chosen by the employer.

Further, there has been at least one prosecution under the general protections provisions of the Act that involved an IFA. The general protections provisions of the Act prohibit employers exerting undue influence or undue pressure on an employee in relation to a decision to make or terminate an IFA. Civil penalty provisions also apply to employers that coerce an employee to exercise a workplace right in a particular way or take adverse action against an employee because of a workplace right.

In *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd*[34], six employees were asked to sign IFAs that removed penalty rates for overtime, weekend and public holiday work. Five of the six employees signed the agreement. One of the employees signed only after the director threatened that there would be no work for him if he did not sign. Another employee had his shifts cut following his refusal to sign. The company also admitted that the information provided to employees failed to comply with the Act. The court fined the operators of the company a total of $30 000.

---

[32] These observations are based on an analysis of IFAs compiled by United Voice.
[33] Fair Work Ombudsman, 'Qld - Pharmacy Industry Audit Program Report 2011', (2012) 11.
[34] [2011] FCA 1064.

While the penalties awarded in this case may have discouraged some employers from using heavy-handed tactics to persuade employees to accept an IFA, the ACTU remains concerned about the risk of coercion in non-unionised, award-dependent workplaces particularly with respect to vulnerable workers.

Sophisticated employers that wish to avoid their legal obligations tend to avoid using template agreements and apply pressure in more subtle ways for example by treating employees that refuse an IFA less favourably or informing other employees that the refusal is causing financial difficulties for the business.

The process by which an agreement is reached is generally not subject to external scrutiny and consequently all but the most egregious breaches remain undetected.

5. The Proposed Amendments

The existing issues identified with the abuse and manipulation of IFAs will be exacerbated by the changes proposed in the Bill. Not only will abuse and manipulation increase, it will remain undetected and unable to be acted upon should the Bill be passed.

The Bill contains a number of significant changes to the provisions governing IFAs and the flexibility terms under which they are made. In summary the Bill:

- requires flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of IFAs with 13 weeks' notice;
- requires flexibility terms in enterprise agreements to provide, as a minimum, that IFAs may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading;
- "clarifies" that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employees is better off overall under an IFA;
- requires IFAs to include a statement by the employee setting out why he or she believes that the arrangement meets his or her genuine needs and leaves him or her better off overall at the time of agreement to the arrangement;
- provides a defence to an alleged contravention of a flexibility term where the employer reasonably believed that the requirements of the term were complied with at the time of agreeing to a particular IFA.

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

While the Coalition's policy provided that workers "can ask for fair and protected flexible working arrangements if they want" or "if they ask for one,"[35] the Bill evinces nothing to this effect.

The consequence for employees of each of the proposed amendments is discussed below.

[35] The Coalition's Policy to Improve the Fair Work Laws, May 2013, pp 7 and 27.

Unilateral Termination with 13 weeks' notice

The unilateral termination period for IFAs made under modern awards is currently set by the model clause in awards. Currently, the minimum unilateral termination period set by the Commission is 13 weeks. For agreements, the minimum unilateral termination period set by the Act is 28 days.

The Bill requires flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of IFAs with 13 weeks' notice.

Unilateral termination is an important safeguard that helps to prevent abuse of IFAs. IFAs are intended to be mutually beneficial for both parties. If an IFA is no longer meeting this objective, the parties to it should be able to terminate the arrangement. This is particularly important given that the process by which agreement is reached and the content of any such agreements are generally not subject to external scrutiny.

The notice period which applied to both kinds of IFAs was originally set at 28 days. The notice period contained in the model flexibility clause in modern awards was altered by the Commission in 2012 in response to concerns raised by employers that the capacity for an employee to unilaterally terminate an IFA with 28 days' notice limits the certainty of agreements and operates as a disincentive to use IFAs.[36]

However, there is little evidence to support the contention that the four weeks' notice period acts as a disincentive for employers to enter into IFAs. [37] The General Manager's Report on IFAs found that less than 1% of employers surveyed who were aware of, but did not make an IFA, cited the four weeks' notice period as the reason why they had not entered into an IFA. The most common reason, reported by just over half of employers, was that there had been no identified need to enter into an IFA.[38]

Moreover, as the Commission noted, the certainty afforded to both parties by a longer notice period must be weighed against other matters including the need to protect employees who through ignorance or for some other reason make an agreement that which materially disadvantages them and to ensure that unforeseen developments, that render a flexibility agreement not only unacceptable to one of the parties but also substantially unfair, can be addressed.[39]

---

[36] See Modern Awards Review 2012 - Award Flexibility Decision, [2013] FWCFB 2170.
[37] [2013] FWCFB 2170, [171].
[38] Table 4.2.
[39] [2013] FWCFB 2170, [175].

The operation of a lengthy notice period has significant consequences for employees that are financially worse off under the terms of an IFA than under the relevant modern award or enterprise instrument. In circumstances where the agreement was not genuinely agreed to or fails to meet the BOOT the employer continues to reap the benefits of having made an unlawful agreement for several months after the employee becomes aware they are being disadvantaged.

For these reasons the ACTU is strongly opposed to any extension to the notice period for unilateral termination.

Genuine Needs Statement and Employer Defence

The Bill modifies the flexibility term in both awards and agreements by inserting a requirement for a genuine needs statement.

A "genuine needs statement" is effectively a testimonial from the worker. It is a statement: "setting out why the employee believes (at the time of agreeing to the IFA) that the IFA:

- meets the genuine needs of the employee; and
- results in the employee being better off overall than the employee would have been if not IFA were agreed to".[40]

The Bill mandates that the flexibility term of an award or an agreement must require that any IFA entered into includes a genuine needs statement.

The creation of a "genuine needs" statement works in tandem with a defence provision which will apply in relation to IFAs entered into in pursuant to the flexibility terms in awards and agreements. The defence provides that an employer does not contravene a flexibility term in relation to an IFA if, at the time when the IFA was made, the employer reasonably believed the requirements of the flexibility term were complied with.[41] The genuine needs statement is clearly a defence mechanism for an employer which ensures that an employer has no obligation to ensure that an employee entering into an IFA has given informed consent to this course of action. There is no protection offered to an employee through the genuine needs statement, rather the genuine needs statement has the opposite effect: denying an employee the ability to assert that they were not fully informed of what they were agreeing to.

The genuine needs statement fails to include any mechanism to quantify the entitlements an employee may be giving up and it does not include any safeguards which would ensure that an

[40] Fair Work Amendment Bill 2014, Item 14.
[41] Fair Work Amendment Bill 2014, Item 204A.

employee understands the monetary value of what they are trading off when they sign up to an IFA. The failure to include such provisions is akin to an employee signing a contract of employment where the consideration the employee gives is not identified or quantified in any way. It is unjust and unconscionable for an employer, a party in both a superior bargaining and industrial knowledge position to an employee, to be able to seek an employee's agreement to something the effect of which the employee may not fully comprehend. Putting the onus on an employee to determine that they are genuinely better off is absurd.

Currently, if an IFA is defective because the employer did not comply with one of the safeguards (for example, if the employer did not ensure that the employee was better off overall), the IFA itself remains valid and in place (until withdrawn from). However, because those safeguards were not complied with in relation to the making of the IFA, the Act deems that the flexibility term has been contravened.[42] Prosecutions for breach of the flexibility term can result in the employer being fined and ordered to pay compensation to workers, if IFA did not in fact result in the worker being "better off overall".[43]

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

The ACTU believes that these amendments are likely to completely undermine the protection afforded to employees by the BOOT and the requirement that an IFA be genuinely agreed to.

Employees that are compelled, either through ignorance or undue pressure, to accept an IFA that reduces their terms and conditions of employment, will have no recourse under the law to recover payments lost as a result of entering into the IFA.

In other words, not only does the employer stand to benefit from an unfair IFA while it is in operation (including during the lengthy period of notice required for unilateral termination), but does so in perpetuity.

Moreover the fact that employers will be able to knowingly breach the provisions of the Act with impunity provides a significant financial incentive to exploit employees. Indeed at least one employer group has stated that "These amendments may contribute to making IFAs more attractive for employers because the spectre of a penalty for non-compliance is removed"[44].

---

[42] s145 (3).
[43] See Part 4-1 of the Act.
[44] VECCI Submission to the Senate Education and Employment Legislation Committee, 24 April 2014, Page 4.

The requirement for a "genuine needs statement" was never identified in the Coalition policy and serves only to bolster an employer's defence to a prosecution. Whilst the defence was identified in the Coalition policy by reference to a recommendation of the Fair Work Act Review Panel, that recommendation stated that the defence should only be available where the employer had notified the Fair Work Ombudsman of the making of the IFA.

If the recommendation were implemented in full, employers would be much more cautious about seeking an IFA that undermines terms and conditions of employment. It is also more likely that the defence would only be used by employers that genuinely believe they had complied with the requirements contained in the Act.

The Better Off Overall Test

In relation to the BOOT for IFAs, it is proposed to insert a Note providing that "Benefits other than an entitlement to a payment of money may be taken into account" for the purposes of that test.

The ACTU is strongly opposed to non-monetary entitlements being used to offset the BOOT. The BOOT is a fundamental safeguard that ensures employees have access to genuine flexibility without having to accept a reduction in wages and conditions.

The current legal authorities support the proposition that a purported IFA which contains a preferred hours arrangement (enabling an employee to trade off monetary benefits such as penalties and overtime in exchange for the flexibility to work their "preferred" hours) does not result in an individual employee being better off overall.[45] The proposed amendments are clearly intended to alter this position.

Unfair arrangements that have been the subject of successful prosecutions or out-of-court settlements under the existing provisions of the Act such as the substandard IFAs offered to Spotless employees would become permissible.

Other examples of IFAs that may be lawful under the proposed amendments include those that:

- enable employees to work from home in exchange for a reduced rate of pay;
- enable employees to vary their start and finish times if they agree to forgo overtime payments;
- enable employees to take annual leave in advance if they forgo their annual leave and shift loadings;

[45] [2013] FWCFB 2170, [136].

- provide employees with access to a car park or meal voucher in exchange for the suspension of applicable allowances; and
- provide part-time employees with a guaranteed number of hours per week in exchange for the suspension of minimum daily engagement provisions.

The safeguards identified in the Panel's recommendation that IFAs "be amended to expressly permit an individual flexibility agreement to confer a non-monetary benefit on an employee and exchange for a monetary benefit, provided that the value of the monetary entitlement forgone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate" have not been included in the proposed amendment.[46]

Consequently, there is no limitation on the monetary entitlements that an employee may be compelled to forgo in order to gain access to much needed flexibility. Employers that can easily accommodate a modest request for flexible working arrangements without incurring any additional costs will be able to use their superior bargaining position to insist on the removal of significant monetary entitlements under the terms of an IFA.

The Bill effectively empowers employers to offer employees hours which are available, rather than hours which an employee would prefer (with reduced or removed penalties). There is a chasm of difference between the hours an employee would prefer and those that an employer will make available to the employee.

Matters that may be subject to an IFA

Finally, the Bill proposes that the flexibility term in agreements cover (at a minimum) arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading.

The current legislation allows the content of flexibility terms in enterprise agreements to be narrower in scope than the model flexibility term. The Explanatory Memorandum to the Bill states that this "means that employees covered by an enterprise agreement may be denied the opportunity for more suitable workplace arrangements even if their employer agrees".[47]

This statement is misleading. There is nothing to prevent employers providing individual employees with access to additional flexibilities either through an informal arrangement, a formal arrangement pursuant to the "right to request" provisions of the National Employment

[46] Recommendation 9, Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation.
[47] Explanatory Memorandum, p xxix.

Standards or common law contract provided that the arrangement does not undermine the terms and conditions contained in the relevant enterprise agreement or modern award.

The key difference between these arrangements and IFAs is that the operation of the BOOT enables IFAs to include terms that are less beneficial provided that the employee is better off overall whereas common law contracts must not derogate in any respect from specific entitlements contained in a modern award or enterprise agreement.

Employees and unions engaged in bargaining commonly seek to restrict the matters that may be subject to an IFA, not because they wish to restrict individual flexibility, but in order to prevent employers targeting vulnerable employees and utilising IFAs to undermine collective conditions.

The effect of the proposed amendment is to restrict the capacity of parties to an agreement to freely negotiate the terms of that agreement and enable employers to systematically undercut beneficial provisions that were agreed to in bargaining. The parties to an agreement have, through a process of bargaining and negotiation, agreed on an appropriate level of flexibility for the enterprise. In some cases this would mean that the flexibility clause is narrow in scope. This is entirely appropriate and the parties' ability to reach a mutual agreement on the scope of the flexibility clause should not be curtailed through the changes proposed in the Bill.

Consideration in the Senate

The Bill was referred to a Senate Inquiry which reported on 5 June 2014. Coalition Senators, Labor Senators and Greens Senators each produced a separate report.

Only the Coalition Senators' report recommended that the Senate pass the Bill. In doing so, the Coalition Senators demonstrated an astonishing lack of understanding of the Bill. In particular, the Coalition Senators' report:

- asserts that "the Bill provides that it is the employee's choice to seek an IFA"[48] (which clearly is not the case); and
- concludes that the provisions of the Bill which impact on IFAs "would have the effect of addressing recommendations 9, 19, 20 and 23 of the Fair Work Review Panel"[49]. Recommendation 9 of the Fair Work Review Panel contained *limitations* on the capacity to trade off monetary entitlements for non-monetary benefits, which have not been

[48] Senate Education and Employment Legislation Committee, Fair Work Amendment Bill 2014 [provisions], June 2014, at 15.
[49] Ibid. at p 16

implemented in the Bill. Further, recommendations 19, 20 and 23 have nothing to do with IFAs and are not addressed in the Bill at all. Further, they are not referenced in the Coalition's pre election policy and two of those recommendations (recommendations 19 and 23) were in fact implemented by the previous government and are part of the current law.

It is unclear whether the Government will move to force the what appears to be a hostile Senate to vote on the Bill, or whether it wait until the composition of the Senate changes post 1 July.

6. Conclusion

The passage of this Bill will provide the green light to unscrupulous employers seeking to exploit workers on statutory individual contracts.

Even if one assumes that the current Senate will be presented with the Bill and vote against it, this is not the end of the matter, as the Bill may be brought back to the Parliament after 1 July when the composition of the Senate has changed.

It is not certain that the Bill will be in identical terms should it be re-reintroduced after that date.

It is clear that the Bill must be opposed if the current deficiencies in IFAs as we know them are to be contained and if the risks identified in this paper are to be avoided. In addition, there are warning signs that a future version of the Bill may attempt to go even further and present additional risks if not guarantees of significant exploitation. These warning signs come in the form of urgings by employer groups to allow IFAs to alter core conditions in the National Employment Standards (so as to provide, for example, for sick leave to be cashed out)[50], to introduce a requirement that an IFA be entered into as a condition of employment (no IFA, no start)[51], and to re-embrace broad scale independent statutory employment agreements (such as WorkChoices era AWAs)[52]. If the Coalition Senators' recently published report on the Bill is anything to go by, these wish lists could be waived through by the Government without any real scrutiny let alone any attempt to understand their impacts on workers.

Whichever path is taken, it is clear that any future version of the Bill that this government brings forward will present a very real threat to the working conditions of every worker in Australia, particularly those who currently receive only safety net conditions.

---

[50] ACCI Submission to the Senate Education and Employment Legislation Committee, April 2014, Page 19.

[51] MBA Submission to the Senate Education and Employment Legislation Committee, 24 April 2014, Page 6.

[52] VECCI Submission to the Senate Education and Employment Legislation Committee, 24 April 2014, Page 3.

ADDRESS
ACTU
365 Queen Street
Melbourne VIC 3000

PHONE
1300 486 466

WEB
actu.org.au

D No: 55 - 2014

ACTU
australian council of trade unions

Australian Unions
Join. For a better life.