Options-stage
Regulation Impact Statement

Fair Work Act Amendments

Contents

1. Context

The *Fair Work Act 2009* (Fair Work Act) and the *Fair Work Regulations 2009* (Fair Work Regulations) provide the legislative framework underpinning the national workplace relations system, which covers the majority of Australian workplaces.

In May 2013 the Government released *The Coalition Policy to Improve the Fair Work Laws* (the Policy) to build on and improve the operation of the Fair Work laws. The key measures and objectives addressed in the Policy are intended to restore certainty to the workplace relations system while balancing the needs of employers and employees. These measures include:

- introducing good faith bargaining and setting realistic timeframes for the negotiation of greenfields agreements
- reinstating the right of entry provisions which existed prior to the Fair Work Act and repealing further recent amendments made by the previous government
- adopting a number of outstanding recommendations of the 2012 post-implementation review of the Fair Work legislation (Fair Work Act Review)
- promoting harmonious, sensible and productive enterprise bargaining.

This Options-stage Regulation Impact Statement examines the amendments that will be included in the first round of measures to implement the Policy deemed to have a regulatory impact. While this Regulation Impact Statement reflects the Department of Employment's (the Department) assessment of the impact of the changes, the Department intends to further consult with stakeholders prior to finalising the Details-stage Regulation Impact Statement and will make any refinements deemed necessary as a result of that process.

2. Greenfields Agreements

2.1 Problem

Greenfields agreements are a form of enterprise agreement that can be made under the Fair Work Act before any employees have been engaged at a new enterprise. They are extensively used in large scale construction and resources projects. They must be made between the prospective employer and a union or unions that are able to represent a majority of employees who will be covered by the agreement.

On large projects, having a greenfields agreement in place is often an essential step in securing finance and other approvals for the project as it provides greater certainty about labour costs and limits exposure to industrial action. The panel conducting the Fair Work Act Review (Review Panel) highlighted the critical importance of major projects to the Australian economy. In its report, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (Review Report), the Review Panel noted evidence provided by the Business Council of Australia (BCA) indicating that the pipeline of capital projects either underway, under consideration or in planning was worth $912.8 billion at that time (page 171). The Review Panel further noted the BCA's view that these projects are not assured, and potential investors continually review risks associated with them (page 171).

Submissions made to the Fair Work Act Review by a number of employer associations representing employers in the construction and mining industries showed that some unions have exploited their legislated role in making greenfields agreements to seek excessive wage claims and delay the commencement of projects, creating significant doubt over whether a project will proceed. Extended negotiation timeframes have immediate cost implications for employers as their negotiating staff will be tied up in bargaining rather than being usefully engaged elsewhere in the organisation. There may also be ancillary costs such as travel and accommodation for the employer's staff members, as well as meeting costs such as meeting rooms.

Greenfields bargaining practices mean that the commencement of projects can be delayed or possibly abandoned, or employers may be forced into agreeing to claims that are economically unsustainable. The Review Panel found that 'some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia' (page 171). The Review Panel found that this situation was because:

> 'the existing provisions effectively confer on a union (or unions) with coverage of a majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way. Unions in this position are able to withhold agreement and effectively prevent the determination of terms and conditions in advance of a project commencing. In light of the evidence we were presented about the need for certainty over the labour costs associated with major projects, we are concerned at the risk of delays in greenfields agreement making that this entails' (page 171-172).

An employer may proceed with a new project without a greenfields agreement in place and negotiate an enterprise agreement when employees commence working on the project. This alternative, while not available for projects where certainty of wages costs is required in order to

achieve investment funding, may result in protected industrial action early in the life of the enterprise, leading to time and cost blowouts. It will also result in such projects relying on the relevant modern award to determine wages and conditions of employment. This is a sub-optimal outcome as these types of projects often require site specific working arrangements not catered for under modern awards. For example, these projects often have employees working on 'week on week off' working hours, while modern awards generally provide for a 38 hour working week.

2.2 Objective

The Government's overarching policy objectives in this area are threefold: to ensure that there are realistic timeframes for the negotiation of greenfields agreements, to ensure that negotiations do not delay or jeopardise investment in major projects, and to provide that the interests of employees to be covered by such agreements are protected.

2.3 Options

2.3.1 Option One – Maintain the status quo

Retaining the status quo will mean that greenfields bargaining is not subject to good faith bargaining rules and that employers will continue to need the agreement of the union or unions able to represent a majority of employees who will be covered by the agreement to make a greenfields agreements. This option will not address issues identified with greenfields bargaining that have resulted in major projects being jeopardised and/or subject to undue delays, and economically unsustainable wages and conditions applying to such projects.

2.3.2 Option Two – Introduce greenfields agreements bargaining reforms

The second option is to amend the Fair Work Act to implement the reforms identified by the Government in the Policy.

This requires application of good faith bargaining rules to greenfields agreement negotiations to address inappropriate bargaining conduct and to encourage unions and employers to reach agreement. The good faith bargaining rules will be modelled on the provisions set out in section 228 of the Fair Work Act, with appropriate differences to account for the particular circumstances in relation to greenfields bargaining. The existing good faith bargaining requirements outline minimum standards of bargaining conduct that must be met, including for example that bargaining representatives must attend and participate in meetings and recognise and bargain with other bargaining representatives.

This option will require the Fair Work Act to be amended to enable an employer to take a proposed greenfields agreement to the Fair Work Commission for approval where agreement has not been reached with the relevant union/s within three months of the commencement of negotiations. Like all other types of enterprise agreements, greenfields agreements will still have to satisfy existing agreement approval tests under the Fair Work Act, including the 'better off overall test'. Additionally, as a new requirement, the Fair Work Commission will also have to be satisfied that the agreement provides for pay and conditions that are consistent with the prevailing standards and conditions within that industry.

Together these measures will work to improve the conduct of bargaining and provide a circuit breaker to ensure that the bargaining parties pursue arrangements that are reasonable, timely and reflect industry standards.

2.4 Impact Analysis

2.4.1 Option One – Maintain the status quo

Option one maintains the status quo. It has been used as the benchmark for considering the costs and benefits of the two options.

Prevalence of the problem

A large number of employer representatives raised concerns about the operation of the greenfields agreement provisions in the conduct of the Fair Work Act Review. They made a range of recommendations in relation to greenfields agreements to address the issues raised by stakeholders.

The Review Panel noted that in the first two years of the Fair Work Act, greenfields agreements comprised 6.4 per cent of all agreements and provided an average annual wage increase of 4.7 per cent, compared to 3.9 per cent for all agreements and 4.0 per cent for union agreements (page 170). The Review Panel further noted that over two-thirds of greenfields agreements occur in construction, with a further 5.2 per cent in the mining industry (page 170). Evidence presented to the Review Panel indicated that concerns with the operation of the greenfields provisions largely centred on these industries.

Benefits

The benefit of retaining option one is that the system is understood by employers and unions and so there would not be any transition costs in developing an understanding of a new greenfields bargaining framework.

Costs

The Review Panel documented a range of costs associated with the negotiation of greenfields agreements under the existing framework. The Review Panel recommended some major changes to the greenfields bargaining framework having found that existing bargaining practices had the potential to threaten investment in major projects in Australia. The Review Panel found that the current system enabled unions 'to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way' (pages 171-172). The Review Panel further found that wages outcomes under Fair Work Act greenfields agreements and enterprise agreements had widened, that greenfields agreements were less likely to contain flexible agreement clauses and that greenfields agreements were more likely to contain clauses that resulted in increased costs for employers (pages 170-171).

2.4.2 Option Two – Introduce greenfields agreements bargaining reforms

Benefits

Option two will ensure that greenfields agreements are negotiated in an appropriate and expeditious manner and that the outcomes of greenfields bargaining are economically sustainable, reflecting terms and conditions of employment of the relevant industry. The changes will mean that the need to negotiate a greenfields agreement does not unduly delay or jeopardise investment in

major projects, while at the same time protecting the interests of the employees to be covered by such agreements.

This approach will significantly reduce the burden on employers who may currently be required to engage in ongoing negotiations with unions for many months. Under current arrangements, an employer may need to allocate dedicated resources for an undetermined period of time to the negotiation of a greenfields agreement. The amendments will provide far greater certainty as to how long negotiation resourcing will be required. This will ensure that staff otherwise involved in protracted bargaining can be productively engaged elsewhere in the organisation.

The amendments will also provide employers with more certainty on project start dates and therefore reduce costs caused by lengthy delays due to prolonged negotiations with the relevant union/s. Expediting negotiations will ensure that business resources are generating income and employment at the earliest opportunity, rather than waiting for an agreement to be negotiated for future employees.

Improving the conduct of greenfields bargaining will also have significant nation-wide impacts given the importance of major projects to the Australian economy. Ensuring that greenfields agreements are negotiated in a timely manner and reflect industry standards will help to maximise the viability of major projects.

Costs

There may be some compliance costs to both employers and unions, particularly where parties have previously not been bargaining in good faith. This will involve, for example, having to attend meetings and respond to proposals of the other party within a reasonable timeframe. This will be offset by expedited start-up of projects and reasonable wage rates in greenfields agreements.

2.5 Regulatory cost calculations

2.5.1 Overview

The Department has identified regulatory reductions associated with legislative changes to reduce the timeframe to negotiate a greenfields agreement. These changes will lead to reductions in administrative costs associated with negotiating a greenfields agreement and delay costs in the form of deferred profits. The Review Panel accepted that unions were in a position to “frustrate” bargaining and withhold making an agreement, creating uncertainty around labour costs and risking project delays.

Based on significant anecdotal evidence and qualitative statements provided to the Review Panel, as a rough estimate, five months is used as a hypothetical time period for protracted greenfields agreement negotiations for major resource and energy projects. The Department considers that the legislative changes to greenfields agreement negotiations would reduce negotiations by two months.

The Department has assumed that while the majority of employers negotiating greenfields agreements under the new arrangements will experience an administrative cost saving due to reduced bargaining times, this may not affect the commencement date of the project. The Department acknowledges that unreasonably protracted greenfields agreement negotiations will

not always result in project delays because other factors can also delay commencement, such as environmental approvals, capital requirements and so on.

In the analysis below, delay costs have been calculated on a per project basis, while administrative costs have been calculated with reference to the number of greenfields agreement negotiations. These have been treated separately in the analysis below.

2.5.2 Delay costs

The delay cost offset has been calculated for major resource and energy projects. The Department considers that regulation change will have the most significant effect on major resource and energy projects, based on evidence provided to the Review Panel (page 171).

Bureau of Resources and Energy Economics (BREE) data on the size and stage of completion of each project is readily available allowing for better informed assumptions. Furthermore, a review of current greenfields agreements shows that the majority cover construction and mining related to major projects. The early stages of resource and energy projects include significant construction work. This is discussed in more detail in the section below.

The Department recognises that regulation change would also lead to a reduction in delay costs for other capital intensive construction projects. These have not been costed due to a lack of available data. It is likely that stakeholders will provide information regarding these projects during consultations which could lead to a revision of the costing.

The Department has used BREE data on major resource and energy projects involving investments greater than $50 million to create a picture of the number of major projects that may be affected by the regulation change. The “Resources and Energy Major Projects Report” (http://www.bree.gov.au/publications/resources-and-energy-major-projects) collates data based on a model of the mining investment pipeline and categorises projects into four stages.

Of these four stages, the “Feasibility Stage” is when greenfields agreement negotiations are most likely to occur. At the Feasibility Stage, projects have undertaken project definition and design studies, commenced detailed planning and conducted environmental surveys.

At April 2013, there were 126 new resource and energy major projects at the feasibility stage. These do not include projects for mine expansion. The average indicative cost of these new projects at the feasibility stage is approximately $1.5 billion. This represents a significant pipeline of investment.

The BREE data indicates that over the 18 months to October 2013, on average, 16 major projects worth around $700 million each moved into the “Committed Stage” each year from the Feasibility Stage. At the Committed Stage, projects have received all required regulatory approvals, finalised the financing for the project and construction may have already started. This would generally occur after greenfields agreements are in place.

Overall, new projects make up almost seven major projects out of every ten. On this basis, the Department assumes that every year out of 16 projects that reach the Committed Stage 10 are new major projects and require greenfields agreements.

Therefore, over a ten year period, 100 new major projects would move from the Feasibility Stage to the Committed Stage. These projects could be delayed by problems with prolonged negotiations identified by stakeholders and the Review Panel.

There is no available data on the frequency of delays on which to cost the regulatory reduction. The Department considers that while greenfields agreement negotiations are one factor out of several that could delay or make projects economically unviable (such as environmental approvals and commodity prices), they occur in the critical path toward project completion and have the capacity to affect project commencement dates.

The cost offset has been based on delays for 50 of the 100 projects over ten years, or five projects per year. This is based on an assumption that around half of all projects moving from the Feasibility Stage to the Committed Stage over the ten year period would be delayed by a greenfields agreement negotiation. The Department considers this may be a conservative estimate and expects that consultations with stakeholders will help better inform this assumption and the costing will be revised if necessary.

The delay costs identified by the Department are based on the methodology used in a Regulation Impact Statement produced by Deloitte Access Economics for the former Department of Sustainability, Environment, Water, Population and Communities, entitled "Cost Benefit Analysis – Reforms to Environmental Impact Assessments under the Environment Protection and Biodiversity Conservation Act 1999" (the EPBC Report), published in April 2011.

This methodology draws on established principles outlined in the Productivity Commission's 2009 report on the "Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector" and estimates made by the Australian Petroleum Production and Exploration Association in "Upstream Oil & Gas Industry Strategy – Platform for Prosperity". The methodology models the impact of delays on project cash flows measured by net present value.

The Department has assumed that for a project involving $700 million in total investment:

- $50 million is invested at the Feasibility Stage,
- $650 million is invested over three years at the Commitment Stage,
- The completed project is productive for 20 years,
- The annual return on investment is 35 per cent, and
- The delay is two months.

Based on this, the Department estimates that reversing the delay of two months on a major project would save $10 million in net present value per project. This would result in a delay cost reduction of $50 million dollars per year for five projects each year.

The assumptions underpinning the delay cost and the result may be revised following consultation with stakeholders.

2.5.3 Administrative costs

The administrative costs identified by the Department are based on the assumption that bargaining for a greenfields agreement currently extends for a period of around five months. The proposed

amendments would enable an employer to take a greenfields agreement to the Fair Work Commission for approval after a period of three months from the commencement of bargaining. It is expected therefore that the proposal would reduce the length of negotiations by around two months, saving considerable costs in resources, particularly labour, devoted to bargaining for each agreement.

It should be noted that this is distinct from delays to the commencement of a major project, detailed above. The Department considers that many greenfields agreement negotiations would not significantly delay the commencement of a major project. Even where a project is not delayed, negotiations can be unreasonably protracted. The Department expects that the proposed changes would likely reduce this cost burden for the vast majority of businesses that are negotiating greenfields agreements.

A review of data published by the Fair Work Commission shows that on average there are around 650 greenfields agreements approved each year (the data can be accessed via the Fair Work Commission website). The Review Panel quoted evidence that around 70 per cent of greenfields agreements are in the construction and mining industries, meaning that there are around 450 agreements in these industries that could be affected by the proposed changes each year (page 170).

The Department has assessed a sample of mining and mine construction greenfields agreements covering major projects. The sample showed that there are, on average, around 40 greenfields agreements in operation at each major project that apply to different contractors. As noted above, an average of 10 new major projects progress to the committed stage, each year. Therefore an average of around 400 greenfields agreements are negotiated each year for major projects.

The high number of greenfields agreements that are negotiated for major projects supports the assumption that the majority of construction and mining greenfields agreements approved by the Fair Work Commission relate to major resource and energy projects. It is expected that the remainder, about 50, would apply to other capital intensive infrastructure projects.

The Department estimates that of these, around 90 per cent from each industry (that is 360 in mining and mining construction and 45 in other construction) would remain in bargaining for around five months and would therefore experience cost savings arising from the proposed changes.

There is no available data on the exact length of greenfields agreement negotiations or enterprise agreement bargaining more generally. However the Department has made a reasonable estimate based on evidence provided by several stakeholders during the Fair Work Act Review that such negotiations with unions are ‘lengthy and onerous’ (page 169). The figure also accounts for the fact that negotiations generally involve several unions, increasing the resources and time required to liaise with, meet, and secure the agreement of, all relevant parties.

While authoritative data on the time dedicated to bargaining for a greenfields agreement is not available, the Department considers that each staff member on a bargaining team would spend approximately 23 hours per week on the negotiations. This figure takes into account not just the direct negotiations, but also the planning, preparation and costing required to negotiate and conclude a greenfields agreement. Furthermore, organisations making greenfields agreements tend

to be large, often multinational or joint venture corporations. While this has not been specifically costed, it is likely that considerable time and resources would be devoted to additional tasks such as meeting with senior executives, liaising with representatives of parent companies and seeking finance and approval from board members.

The Department accepts that staff members, and therefore labour costs, dedicated to bargaining for greenfields agreements would vary, including based on the profile of the agreement, approach taken to bargaining by the union and the industry in which negotiations occur. These costs are treated separately below.

Table 1 below sets out the average weekly earnings before tax for a number of roles expected to be involved in negotiations. These data about jobs and earnings are provided on the Government's Job Outlook website. These roles have been identified for their expertise in labour relations and the specific work and organisation to be conducted at greenfields sites. Hourly rates of pay have been calculated by dividing the weekly amount by 38 hours.

Table 1 - Employee earnings

Role	Weekly earnings	Hourly rate
Human Resources Manager	$1,875	$49.34
Human Resources Professional	$1,250	$32.89
Mining Engineer	$2,844	$74.84
Building and Construction Manager	$1,538	$40.48

Negotiations for agreements at major projects

- *One headline greenfields agreement per major project*

Major projects in the mining and mine construction industry tend to have one 'headline' or high profile greenfields agreement, for which the negotiations are resource intensive. The Department considers that a bargaining team for these agreements would comprise five relatively senior staff members; two Mining Engineers, two Human Resources Managers and one Human Resources Professional.

On the assumption that each member of the bargaining team would spend approximately 23 hours per week on the negotiations and that the length of negotiations is reduced by two months, a business is likely to save 184 hours of wages for each staff member. Applying this to 10 greenfields agreements each year (one per major project), the proposed changes would result in a compliance cost saving of $600,263.20. This has been calculated in the business cost calculator, and includes the automatic on-cost to labour rates.

- *Several greenfields agreements at each major project*

The remaining greenfields agreements associated with major mining and mining construction sites tend to adopt fairly similar provisions to those enshrined in the headline agreement, with modification to suit the specific needs of the employees to be covered by the agreement. For this reason, negotiations are likely to be less resource intensive. The Department considers that a

bargaining team for these agreements would comprise three staff members, comprising one Mining Engineer and two Human Resources Managers.

On the assumption that each member of the bargaining team would spend approximately 23 hours per week on the negotiations and that the length of negotiations is reduced by two months, a business is likely to save 184 hours of wages for each staff member. Applying this to about 350 greenfields agreements each year, across the ten major projects, the proposed changes would result in a compliance cost saving of $12,961,788.00. This has been calculated in the business cost calculator, and includes the automatic on-cost to labour rates.

Negotiations for agreements at other capital intensive infrastructure/construction sites

The resources dedicated to greenfields agreement negotiations associated with other capital intensive infrastructure projects would likely vary depending on a range of factors, including the size of the project, number of employees to be employed at the site and the organisations involved. The Department estimates that on average a bargaining team for these agreements would comprise two staff members, one Human Resources Manager and one Building and Construction Manager.

On the assumption that each member of the bargaining team would spend approximately 23 hours per week on the negotiations and that the length of negotiations is reduced by two months, a business is likely to save 184 hours of wages for each staff member. Applying this to the approximately 45 greenfields agreements associated with construction sites each year, the proposed changes would result in a compliance cost saving of $862,693.20. This has been calculated in the business cost calculator, and includes the automatic on-cost to labour rates.

Based on the cost of all negotiations, calculated in the business cost calculator, the proposed changes would result in a total compliance cost saving of $14,424,744.40 each year.

The cost offset in table 2 below is based on a total saving per year over ten years.

Table 2 - Annual cost offset

	Agency	Within portfolio	Outside portfolio	Total
Business	$0	$64,424,744	$0	$64,424,744
Not-for-profit	$0	$0	$0	$0
Individuals	$0	$0	$0	$0
Total	$0	$64,424,744	$0	$64,424,744

3. Right of entry

3.1 Problem

Under the Fair Work Act union officials with an entry permit have a right to access workplaces to hold discussions with employees. Right of entry rights in the Fair Work Act are broader than under previous workplace relations legislation and have led to excessive workplace visits and unnecessary disruptions at some workplaces.

To be entitled to enter a workplace to hold discussions under the *Workplace Relations Act 1996*, a union had to be bound by an award or agreement that covered a workplace where there were union members or employees eligible to be union members. The Fair Work Act amended the right of entry provisions so that a union official's right to enter a workplace to hold discussions is tied to whether the relevant union is entitled to represent the industrial interests of relevant employees at the workplace. This has increased the number of unions that can visit a particular workplace and has resulted in increased costs to some employers, including to productivity, due to excessive visits by some unions and disputes between unions over eligibility to represent employees.

Each time a union official visits a workplace to hold discussions with employees, an employer must allocate resources to facilitate their entry, taking resources away from other tasks. This would typically involve allocating employee/s to ensure that a union official complies with all work health and safety requirements at the workplace, including taking them through a safety induction if necessary, and escorting the union official around the workplace.

The significance of the problem of excessive workplace visits by union officials was recognised by the Review Panel. For example, it was noted in the Fair Work Act Review Report that during the construction phase of BHP Billiton's Worsley Alumina plant, visits by union officials increased from zero in 2007 to 676 visits in 2010 alone (page 193). The Review Panel also noted that Ai Group submitted that in a survey of 245 employers in August 2011 across many industries, 37 per cent of employers reported that union officials had visited their workplace more often since the commencement of the Fair Work Act (page 193).

Evidence provided by the Chamber of Commerce and Industry Western Australia to the Review Panel was also outlined in the Fair Work Act Review Report. An affidavit attached to the submission described one workplace being visited up to 17 times a day and nearly 700 times in a year on onshore resource construction projects in Western Australia (page 193). In the 2010 Fair Work Australia case of *CFMEU v Foster Wheeler Worley Parsons (Pluto) Junior Venture* [2010] FWA 2341 the employer gave evidence that there had been 217 right of entry requests made in a four month period in 2009 at workplace where approximately 3300 employees were engaged (page 193).

The Review Panel noted that evidence submitted to them suggested that frequent right of entry visits is a more significant issue for large worksites where several unions have a right of entry, such as those in the mining or construction sector (page 193). Furthermore, the Review Panel was concerned that in some instances the motivation for excessive right of entry visits may not be consistent with those authorised by the Fair Work Act (page 194).

New provisions which commenced on 1 January 2014 may directly lead to disruption of employees during their meal breaks. Prior to 1 January, an employer was required to provide a reasonable room for a union official to conduct interviews or hold discussions. A union official now has access to the meal or break room if agreement on another room cannot be reached between the union and employer. In submissions to the Parliamentary inquiries into the Fair Work Amendment Bill 2013 (which introduced this new provision) many stakeholders raised concerns that this will prevent employees from enjoying their breaks without disruption, noting that the majority of Australia's workforce are not union members (available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ee/fairwork13/subs.htm).

Since 1 January 2014 the Fair Work Commission has a new power to resolve disputes about frequency of right of entry visits, however the high threshold to be met before the Commission can exercise its power will mean that it is likely to have little practical impact. The Commission must be satisfied that the frequency of visits would require an unreasonable diversion of the employer's 'critical resources', a test that will be difficult for the majority of employers to meet in the industries most impacted by frequency problems. Evidence presented to the Review Panel indicated that the problem is largely confined to employers on major projects (page 193), who are unlikely to be able to meet the 'critical resources' test in any circumstances. This is due to the fact that a project may have a large number of employees on site and the employees responsible for escorting union officials for right of entry purposes are not likely to be a critical resource in the construction/production process.

There is also a new obligation (since 1 January 2014) on employers to facilitate transport to, and/or provide accommodation at, remote sites where no other transport or accommodation is available. In addition to the usual costs associated with such visits including ensuring work health and safety requirements are met and escorting officials, other ancillary costs incurred by an employer in organising transport and accommodation for union officials will also not be recoverable from the union official or their union. Such ancillary costs include allocating staff to organise the visits which would include booking relevant transport, liaising with the union official and/or the union about the arrangements and ensuring there is adequate accommodation available on site. The employer would also have the burden of arranging the recovery of costs from the union official or union. This obligation, which was implemented through the *Fair Work Amendment Act 2013*, was not recommended by the Review Panel.

The Policy also undertakes to require photographic permits for union officials. Currently right of entry permits are not photographic and photographic identification is not required to be presented, meaning that employers are unable to verify the identity of union officials. This has the potential to allow a person other than the union official to gain entry to a workplace. This poses both commercial privacy and security risks.

3.2 Objective

Unions have a legitimate role in the representation of employees and their workplace rights. However, it is important that this is appropriately balanced with the need for employers and employees to carry out their work without undue disruption. The objective is to obtain a more

appropriate balance by reducing the disruption to employers and employees caused by right of entry visits for discussion purposes and ensure appropriate safeguards are in place so that right of entry rules are not exploited.

3.3 Options

3.3.1 Option One – Maintain the status quo

If the status quo is maintained union officials will continue to be subject to the requirements of the Fair Work Act when exercising a right of entry. Given that the Review Panel received many submissions raising concerns that the Fair Work Act had led to more frequent right of entry visits and the Review Panel found there had been overly frequent visits by some unions in some workplaces (page 193), it is likely that excessive and disruptive right of entry visits will continue.

It is also unlikely that the Fair Work Commission will be able to provide practical assistance to effectively deal with frequency disputes because most affected employers will not be able to satisfy the criteria that excessive visits has caused an unreasonable diversion of their 'critical resources'.

3.3.2 Option Two – Implement the Government's right of entry reforms

Option two is to implement the Government's proposed right of entry reforms outlined in its Policy.

This option involves narrowing the circumstances when unions can enter workplaces for discussion purposes. Workplace access rights will be based on the principles of a union having a recognised representative role at the workplace and employees wishing to have discussions with that union.

Under this option the Fair Work Commission's power to deal with disputes about the frequency of right of entry visits will be strengthened. This will be done by allowing the Commission to make orders to resolve such disputes when satisfied there has been an excessive number of right of entry visits to a workplace. This approach is consistent with recommendation 35 of the Review Panel (see page 195).

This option also involves repealing the amendments introduced by the *Fair Work Amendment Act 2013* to allow union officials to hold discussions in lunch or meal rooms as a default and requiring employers to facilitate transport to, and/or accommodation at, remote sites where no other transport or accommodation is available.

Finally this option will involve requiring entry permits, issued by the Fair Work Commission, to include a photograph of the union official to assist employers in verifying the identity of those persons seeking to enter their workplace.

3.4 Impact Analysis

3.4.1 Option One – Maintain the status quo

Prevalence of the problem

Many employers and employer representatives raised concerns about the operation of the right of entry provisions in submissions to the Review Panel and during the Parliament's consideration of the *Fair Work Amendment Act 2013*, which made a number of amendments to the provisions. The level

of concern raised by stakeholders since the commencement of the *Fair Work Act 2009* indicates that the problem is significant for some employers and widespread.

Benefits

The main benefit of maintaining the status quo is that all parties will continue to operate under the existing system, without any need to familiarise themselves with further new rules.

The Fair Work Commission will have the power to deal with some disputes about the frequency of right of entry visits by union officials to some workplaces. This could result in orders being made to prevent excessive visits at some workplaces.

Additionally, the Fair Work Commission will not have to introduce new photographic entry permits.

Costs

If the status quo is maintained, excessive right of entry visits will continue and may increase. This has the potential to reduce productivity at some workplaces.

Evidence submitted to the Review Panel by the Chamber of Commerce and Industry of Western Australia reported that each visit requires between 60 and 90 minutes for the employer to deal with, and up to 3.5 hours on remote sites (page 193). Furthermore, it was identified in the submission that employers have additional costs associated with providing vehicles to facilitate transport onsite in some instances and training staff to assess eligibility for entry (page 193).

The Review Panel noted that employers may need to set aside time and resources to attend to more frequent entry requests (page 194). With evidence presented to the Fair Work Act Review of as many as 700 right of entry visits a year at some workplaces, the cost to employers of facilitating entry will remain significant if the status quo is maintained (page 193).

The new provisions to facilitate right of entry at remote sites will have the added ongoing cost of facilitating transport to, and/or accommodation at, workplaces for union officials.

Maintaining the right of union officials to hold discussions with employees in the lunch or break room at a workplace by default risks disruption of employees during their meal or other breaks.

Without effective arrangements in place to ensure that union officials' identities can be verified there are risks of unauthorised entry to workplaces by persons misusing permits.

3.4.2 Option Two – Implement the Government's right of entry reforms

Benefits

If implemented, option two will decrease the costs for employers associated with facilitating excessive right of entry visits. Consequentially, with fewer resources required to manage right of entry visits and related requirements, including transport and/or accommodation for union officials wishing to visit remote sites, employers will benefit from an increase in productivity. The reforms will be particularly beneficial for employers currently experiencing or likely to experience excessive right of entry visits.

Benefits to productivity will also flow from a reduction in disputes about frequency of visits, as well as disputes being resolved more quickly due to the Fair Work Commission's more effective powers to deal with such disputes.

Employees will be positively impacted by reducing the likelihood of union officials disrupting lunch and meal breaks by holding discussions in the lunch or meal room at the workplace. This will ensure that employees can enjoy their breaks in the locations allocated for this purpose without uninvited interruption.

Costs

The requirement for photographic entry permits may have a minor impact on union officials as they will need to obtain a new entry permit from the Fair Work Commission. The Fair Work Commission will retain responsibility for issuing entry permits.

3.5 Regulatory cost calculations

3.5.1 Frequency of visits

The Department has identified reductions in regulatory costs associated with proposed changes to union right of entry laws to reduce the frequency of union visits to workplaces for discussion purposes in circumstances where there is an excessive number of visits. The reforms will reduce the costs to business associated with the administration and oversight of such visits.

The Fair Work Act Review found that the number of right of entry visits by some unions to some workplaces was excessive, based on evidence provided by a number of employers and their representatives. Excessive visits were predominantly raised as a concern in the building and construction and mining industries, however the problem is also understood to be evident in other industries.

The Department has quantified the cost reduction for businesses which are likely to be most affected by the change in right of entry, namely businesses involved in resource projects. This assumption is supported by the submissions provided to the Review by employers and their representatives in the resource and construction industries, including BHP Billiton and the Chamber of Commerce and Industry of Western Australia (CCIWA). The Review Panel noted that submissions "suggest that the issue is a more significant problem for large worksites… such as those in the mining and construction industries" (page 193).

Details regarding entry rights were detailed during the Fair Work Act Review and accepted by the Review Panel when making recommendation 35. Data and evidence provided to the Review Panel is used as a model for costing savings from the regulation change.

While the focus of the costing is on businesses most significantly impacted by excessive right of entry visits it is recognised that there are many others outside of those considered here which will benefit from the Government's reforms through a reduction in union official visits.

The effect on other sectors will be the subject of consultations with stakeholders and may lead to a revised regulatory reduction.

Number of visits for discussion purposes

In its submission to the Review, BHP Billiton (BHP) provided data on the number of statutory rights of entry undertaken in the last five years at its Worsley Alumina plant in Western Australia. Based on the information provided by BHP, between 2009 and 2011 there were around 630 union official visits per year on average (page 193).

The evidence provided by BHP is supported by the CCIWA submission to the Review Panel, which put the number of visits at 700 per year for onshore resource construction projects. The Review Panel also cited a Fair Work Commission matter where an employer gave evidence of over 200 entry requests being made in just under a four month period (page 193).

BHP did not differentiate between entry permits for discussion purposes or to investigate a contravention, however, the Review Panel remarked that in general terms, it "seems unlikely that the incidence of visits to a workplace to investigate a suspected contravention would be high" (page 194). This is particularly the case given the significantly higher threshold that applies to entry for investigation purposes, which includes that:

- the alleged breach must relate to a union member working at the premises,
- there must be a reasonable suspicion that a contravention has occurred or is occurring, and
- the entry notice must specify details of the alleged contravention.

On this basis, the Department has assumed that around 10 per cent of visits are to investigate a contravention. Therefore, there are on average around 570 visits per year for discussion purposes at each large resource project.

The Department estimates that under the proposed changes each large resource project workplace would experience 260 fewer visits for discussion purposes each year. This is calculated on the assumption that there is on average around six unions entering each large project, each conducting one visit per week. This will result in each workplace experiencing a total of around 310 right of entry visits per year. The total reduction of 260 visits per workplace per year is calculated by subtracting the number of visits that will continue as a result of the proposed changes (310) from the total number of visits for discussion purposes (570).

Costs

The main costs associated with the offset are administrative costs. This includes time for an employee to process the visit request and to oversee the visit.

In its submission to the Review, CCIWA submitted that "the average time taken by projects to deal with each visit was between 60 and 90 minutes, and up 3.5 hours on remote projects" (page 193). Based on this it is assumed that on average a right of entry visit takes two hours labour time to process and oversee.

It is assumed that the administrative tasks undertaken to process and oversee union visits is performed by an employee in a middle management position earning $180,000 per annum. This is based on average salary data for the management positions in the mining industry compiled by jobs and recruiting websites.

The Department expects that frequent union visits also occupy the time of senior decision-makers involved in projects and divert security personnel toward overseeing union visits. These have not been quantified in the Options-stage Regulation Impact Statement, although, the significance of these costs may be discussed during consultations and the Department may have cause to revisit them.

Number of business affected

The Bureau of Resources and Energy Economics (BREE) publishes research on the number of major resource and energy projects in Australia and their stage of completion. Most recent data show that at April 2013, 73 projects were at the Committed Stage. Projects at this stage have either started construction or are preparing to start construction.

In addition to these projects, in the six months to October 2013, 18 major projects progressed to the Completed Stage (Resources and Major Projects October 2013, page 20). At the Completed Stage, initial commercial level production has commenced. A similar number of projects progressed to the Committed Stage every six months in the 12 months to April 2012, suggesting that the number of major projects reaching completion has been steady over the past 18 months (see Resources and Major Projects April 2013, page 20 and Resources and Major Projects October 2012, page 25).

Projects at the Completed Stage and Committed Stage are both likely to receive union visits. It is estimated that, based on evidence presented to the Review Panel, around 100 such projects at the Committed Stage would be experiencing high-level right of entry visitations.

3.5.2 Repeal of right of entry accommodation and transport provisions

The Government proposes to repeal an amendment made by the previous government through the *Fair Work Amendment Act 2013* which, from 1 January 2014, will require occupiers of remote sites (employers) to facilitate transport to, and/or provide accommodation at, those sites if no other transport or accommodation is available for unions seeking to access remote worksites.

The Department considers that the vast majority of remote sites where these arrangements might apply would be offshore work sites, mining sites and mining construction sites.

Data from the National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA) indicates that in 2012 there were 151 active offshore facilities. Due to the geographical application of the Fair Work Act, around 80 per cent of these facilities would be subject to the 'remote' worksite provisions. Therefore around 120 of the remote sites within NOPSEMA's jurisdiction would potentially be affected by the proposed changes.

Based on data from BREE and GeoScience Australia there were a total of 470 operating mines and resource and energy major projects at a Committed Stage at October 2012. Projects at a Committed Stage are typically commencing construction and would therefore be a workplace at which a union could exercise a right of entry. Given the provisions apply only to 'remote' sites which are not reasonably accessible, the Department estimates that around 10 per cent of the 470 sites, that is 47, would be 'remote' sites.

On this basis, around 167 sites (120 offshore facilities and 47 mining or mining construction sites) across Australia are likely to be considered 'remote' for the purposes of the provisions.

As noted above, the provisions enable a business to recover the cost of providing transport and/or accommodation to the union official, but do not allow for the recovery of ancillary costs, such as administration and wages of employees facilitating visits. As the provisions came into effect so recently (1 January 2014), it is difficult to determine the exact cost of the requirement to provide access to transport and accommodation on remote worksites.

In estimating the cost of facilitating transport and/or accommodation arrangements the Department has used job titles and average yearly salaries before tax in the mining, oil and gas sector, drawn from the MyCareer Salary Centre. Hourly rates of pay have been calculated by dividing the yearly salary by 52 weeks and dividing that figure by 38 hours.

Visit coordination

Staff would be required to manage logistics for a visit, involving organising accommodation and travel arrangements, including liaising with relevant service providers such as travel providers, caterers and accommodation providers, and liaising with the union and union official. The Department anticipates that for each visit by a union official this task would take one Service Coordinator, or equivalently paid person, around 3 hours, at a rate of $93.39 per hour.

Workplace relations specialist

A workplace relations representative, work health and safety officer or equivalent staff member would be required in most instances to escort the union official for the entirety of their visit. The Department expects that this would require around 8 hours paid time for each visit for a Safety Manager or equivalently paid person at a rate of $93.39 per hour.

Invoicing

Staff would be required to seek reimbursement of transport and accommodation costs from the relevant union. The Department estimates that this would require one and a half hours labour by a Finance Manager, or equivalently paid person, at a rate of $62.37 per hour. In some instances there may be disputes about the reasonableness of the costs, which would require additional time, however this has not been included in the costing.

Based on calculations that a Service Coordinator would be paid around $280.20 per visit, a Safety Manager would be paid $747.15 per visit and a Finance Manager would be paid $93.50 per visit, total salaries paid for each visit would amount to approximately $1120.85. It estimated that each of the 167 remote worksites would experience an average of two union visits per year therefore each business would spend approximately $2250 per year.

The total compliance cost saving resulting from the proposed repeal, calculated using the business cost calculator to include automatic labour on-costs, would therefore be around $434,250 each year.

The cost offsets in table 3 below have been costed using the business cost calculator.

Table 3 - Annual cost offset

	Agency	Within portfolio	Outside portfolio	Total
Business	$0	$6,216,130	$0	$6,216,130
Not-for-profit	$0	$0	$0	$0
Individuals	$0	$0	$0	$0
Total	$0	$6,216,130	$0	$6,216,130

4. Individual Flexibility Arrangements

Employees and employers are able to achieve flexibility in the workplace through individual flexibility arrangements (IFAs) under the Fair Work Act. IFAs vary terms of modern awards or enterprise agreements in order to meet the genuine needs of employers and individual employees, while ensuring minimum entitlements and protections are in place.

Flexible work practices deliver benefits to both employees and employers. Use of IFAs can lead to greater job satisfaction, improve the ability for employees to manage outside-of-work responsibilities and help employers to attract and retain staff. Flexibility in the workplace can also improve workplace productivity and efficiency by helping maintain a motivated workforce with reduced staff turnover and absenteeism.

To ensure that employees and employers are able to make fair and protected flexible workplace arrangements, the Policy proposes implementing the Review Panel's Recommendation 24. Specifically, the proposed amendment will ensure that enterprise agreements cannot restrict the scope of IFAs, while ensuring that employees who are party to an IFA will be better off overall. This will give effect to election commitments made by the Government's Policy.

4.1 Problem

Under section 202 of the Fair Work Act, an enterprise agreement must include a 'flexibility term' that enables an employee and his or her employer to agree to an IFA. If an enterprise agreement does not include a flexibility term, the model flexibility term set out in the Fair Work Regulations will apply. An IFA has effect as if it were a term of an enterprise agreement and can be enforced as such.

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

The Review Panel highlighted a number of deficiencies with the current regulation of IFAs, including the restrictive nature of flexibility terms in enterprise agreements.

The Department of Education, Employment and Workplace Relations' submission to the Review Panel noted that the model term, or terms that provide for unrestricted flexibility, were included in 57.4 per cent of Fair Work Act enterprise agreements approved between 1 July 2009 and 30 September 2011, covering 60.8 percent of employees (page 164).

The submissions to the Review Panel indicated that in many cases neither employees nor employers were satisfied with the current IFA provisions, with many proposing that the model flexibility term operate as a mandatory minimum in enterprise agreements, with an ability to bargain for greater flexibility (page 163).

In concluding its findings, the Review Panel stated that flexibility terms have not always allowed for genuine flexibility. In order to create an opportunity for greater use of IFAs, the Review Panel found that 'matters covered by the model flexibility term should be included in all enterprise agreements

as the minimum matters over which a flexibility term is permitted, with bargaining representatives having the capacity to negotiate for additional flexibility if they so wish' (page 164).

4.2 Objective

The proposal to implement Review Panel Recommendation 24 will give effect to election commitments made by the Government in its Policy.

Currently, IFAs are available for employers and employees to use in order to achieve workplace flexibility. However, there is evidence that these are not being widely used by employers and their content is restricted in enterprise agreements.

The objective of the proposal is to ensure that the scope of terms in an IFA is not able to be restricted by an enterprise agreement. Specifically, section 203 will be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the Fair Work Regulations along with any additional matters agreed by the parties.

Employees covered by an enterprise agreement will have the opportunity to develop more suitable workplace arrangements with their employer's agreement. The removal of restrictions will allow employees to work more flexibly and to suit their personal situation, while remaining better off overall. Under the legislation IFAs are subject to the 'better off overall test', which requires that the employee must be 'better off overall' under the IFA than they would be under the relevant modern award or enterprise agreement.

4.3 Options

4.3.1 Option One – Maintain the status quo

The requirements to be met by a flexibility term are outlined in section 203 of the Fair Work Act, including that it must be in writing and that the employer must ensure the employee covered by the IFA is better off overall as compared to the enterprise agreement it varies.

If the status quo is maintained, IFAs made under enterprise agreements will continue to be regulated by the relevant sections of Fair Work Act and the model flexibility term in Schedule 2.2 of the Fair Work Regulations.

If the status quo is retained, the ability to restrict the scope of terms that can be included in an IFA made under an enterprise agreement will continue. This will continue to limit the potential for employees and employers to enjoy the potential flexibility and productivity that could derive from less restricted IFAs.

4.3.2 Option Two – Implement Review Panel Recommendation 24

The Review Panel recommended that section 203 of the Fair Work Act be amended to broaden the scope of terms to be included in IFAs in enterprise agreements (page 164). Recommendation 24 reads:

> *The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties* (page 164).

The Policy outlines the intention to implement this Review Panel recommendation so that IFAs can be made about the five minimum matters listed in the paragraph 1(a) of the model flexibility term in Schedule 2.2 of the Fair Work Regulations, along with any additional matters agreed by the parties. The five minimum matters are: arrangements about when work is performed, overtime rates, penalty rates, allowances and leave loading.

The proposed amendment will ensure a broader range of matters can be subject to IFAs and employers and employees will be freer to negotiate arrangements that better suit their needs. This will support employers and employees to make IFAs to create flexible work practices that enhance productivity and job satisfaction, while retaining the better off overall test to ensure employees are protected. Additionally, this approach will align with the approach generally taken in model flexibility clauses in modern awards.

4.4 Impact analysis

The status quo, as outlined in option one above, has been used as the benchmark to examine the costs and benefits of the proposed amendments under option two. The analysis focuses on the effects of expanding the range of terms that employers and employees can utilise in IFAs, as is proposed in Recommendation 24.

Overall, implementing Recommendation 24 will make it easier for employees and employers to create genuinely flexible and productive IFAs in Australian workplaces while still ensuring protection for employees.

The *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements: 2009-2012* (the General Manager's Report) highlighted a number of reasons as to why employers are reluctant to enter into IFAs, including that IFAs do not allow sufficient flexibility (General Manager's Report, page 41).

This is supported by the Review Panel's findings that flexibility terms in enterprise agreements do not always allow for the flexibility that was intended (page 164). Additionally, the reasons provided in submissions to the Review Panel for not entering into IFAs included that the flexibility terms that unions and employers negotiate during enterprise bargaining are often narrower than the model flexibility term (page 163). The evidence for the Review Report was gathered from organisations of all sizes across various industries.

4.4.1 Option One – Maintain the status quo

Option one maintains the status quo. It has been used as the benchmark for considering the costs and benefits of the two options.

Benefits

Employers and employees would continue to access the IFA scheme in the legislation, despite any restrictions in enterprise agreements.

The General Manager's Report identifies many perceived benefits of IFAs to employees and employers. Employees identified benefits relating to take-home pay, superannuation, leave arrangements and flexibility for family reasons. Employers identified benefits relating to rostering, reduced costs, staff attraction and retention and improved efficiency or productivity of staff (General Manager's Report, page 67-68).

Costs

A significant cost of option one is that the legislation currently permits limiting the potential for employees and employers to enjoy the full benefits of IFAs, particularly given parties already recognise the significant benefits that can stem from IFAs. If the current arrangements are maintained, some employers and employees will not have the opportunity to enjoy the potential benefits of workplace flexibility.

In their submissions to the reviews, employers have noted that there are flow-on cost of IFAs not providing genuine flexibility (General Manager's Report, page 41; Review Report, page 106), most specifically being a lack of meaningful flexibility in the workplace and therefore less opportunity to harness increased productivity (General Manager's Report, page 93).

With regard to employees, there are many published and well recognised costs associated with a lack of flexibility in the workplace or 'work-life balance'. These costs include a negative impact on mental and physical health and interference with family relationships.

4.4.2 Option Two – Implement Review Panel Recommendation 24

Implementing Recommendation 24 will enable all employers and employees covered by an enterprise agreement to negotiate an IFA that covers the five minimum matters listed in the model flexibility term, and can include any additional matters that are agreed during enterprise bargaining.

Benefits

The benefits of option one will continue under option two, however, these will be enhanced to ensure increased access to flexibility for employers and employees.

In particular, a significant benefit of option two is that employers and employees will be freer to negotiate individual arrangements that suit the needs of the employee and the requirements of the business. As the better off overall test will continue to apply and because IFAs must be genuinely agreed to between the parties, improved workplace arrangements will be ensured for both employees and their employers. Consequently, these factors are likely to increase the use of IFAs in Australian workplaces.

Given the benefits of IFAs identified by the General Manager's Report (page 67-68), it is reasonable to assume that a higher prevalence of genuinely flexible IFAs could strengthen those benefits identified for employees and employers in option one and make their use more widespread across Australian workplaces.

The proposal will guarantee that all employees will have access to fair flexibility regardless of whether they are covered by the model flexibility term or not.

Costs

The intention of the proposal is to ensure IFAs can be made on a range of issues broad enough to suit the individual needs of employees and employers. It is foreseeable that following implementation of the proposal, unions may seek to restrict a flexibility term in enterprise agreement negotiations to cover only the five minimum matters in the model flexibility term, rather than also including any additional matters.

5. Annual Leave Loading

5.1 Problem

The Review Panel noted in its Review Report that annual leave loading was originally provided to compensate employees for the notional loss of overtime earnings while on leave (page 99). The benefit has since spread to most sectors of the workforce, including areas not generally subject to overtime payments.

Section 90(2) of the Fair Work Act provides that if on termination an employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave. This means that if an employee is entitled under an industrial instrument to leave loading when they take annual leave it must be included in the amount paid on termination for untaken leave. As section 90(2) is part of the National Employment Standards (NES) it is a minimum standard of employment and cannot be reduced by an industrial instrument.

Under the Fair Work Act leave loading is therefore payable to employees regardless of any provisions to the contrary in the relevant industrial instrument. This conflicts with the longstanding position prior to the Fair Work Act whereby leave loading was not payable on termination unless expressly provided for in the relevant industrial instrument. Of the current 122 modern awards, 113 contain an entitlement to annual leave loading. Around 17 per cent (or 19 modern awards) provide that annual leave loading is not paid on termination and around 68 per cent (77 modern awards) are silent on whether it is payable.

It is not possible to precisely determine what proportion of Australian employees have their pay set by a modern award. Australian Bureau of Statistics data shows that in May 2012 16 per cent of employees had their pay set by award and 42 per cent of employees had their pay set by collective agreements. However, as this includes employees covered by state industrial relations legislation it is not possible to extrapolate from this the proportion of employees who are covered by modern awards or enterprise agreements made under the Fair Work Act. Further, there is no way to ascertain how many employees have their pay set by each modern award, as coverage figures are not measured. This is further complicated by the fact that in many workplaces modern awards are supplanted or supplemented by an enterprise agreement, and reliable data is not available on annual leave loading payable under enterprise agreements.

Employers who, prior to the Fair Work Act, did not have to pay annual leave loading on an employee's termination of employment, have incurred an additional cost in paying out the annual leave on termination as required by section 90(2). Leave loading typically amounts to 17.5 percent of the base rate of pay, depending on the relevant modern award or enterprise agreement.

Many stakeholders raised concerns about this issue with the Review Panel in submissions and during meetings. Stakeholders were concerned that the Fair Work Act had displaced the longstanding position that annual leave loading is only payable to an employee on termination if expressly provided for the in the relevant agreement or award, and this change has resulted in additional costs for a large number of employers (page 99-100).

As the provision of the Fair Work Act which displaces the longstanding position does not expressly state that annual leave loading is payable on termination, this fact is not clearly understood by all stakeholders. The Review Panel noted that many employer representatives dispute the interpretation of this provision (page 100). This creates confusion for, and disputes between, employees and employers.

5.2 Objective

The objective is to reinstate the longstanding and well understood position that was in place prior to the Fair Work Act to provide that leave loading is only payable on termination if expressly provided for in the relevant industrial instrument. This will reduce confusion and provide certainty on the issue for employers and employees.

5.3 Options

5.3.1 Option One – Maintain the Status quo

If the status quo is maintained, employers will continue to be required to pay annual leave loading on termination to employees who are entitled to the loading when taking annual leave, even when this is ruled out by their relevant industrial instrument. This typically amounts to a loading of 17.5 per cent on top of an employee's base rate of pay for any untaken annual leave on termination.

5.3.2 Option Two – Make annual leave loading payable on termination where for provided under the relevant industrial instrument

Option two would involve restoring the longstanding position that was in place prior to the introduction of the Fair Work Act, as recommended by the Review Panel (page 100). This would require employees to be paid annual leave loading on termination for any period of untaken annual leave only when this is expressly provided for under the applicable modern award or enterprise agreement. Employees would still be entitled to be paid for outstanding annual leave.

This approach would still enable leave loading to be paid on termination, as long the entitlement is expressly provided for in an enterprise agreement or modern award.

5.4 Impact Analysis

5.4.1 Option One – Maintain the status quo

Benefit

The benefit of maintaining the status quo is that all employees in the national workplace relations system who are covered by an industrial instrument that provides for annual leave loading will continue to be entitled to that amount of loading on annual leave they have not taken when they separate from their employer.

Cost

Maintaining the status quo will continue to have the potentially significant cost for employers of having to pay annual leave loading to employees on termination for any untaken annual leave, even where the relevant agreement or award provides otherwise. For many employers this cost may be

unforeseen, particularly when the relevant industrial instrument expressly provides that annual leave loading is not payable on termination.

Currently there are 19 modern awards (around 17 per cent of all modern awards) that expressly provide that annual leave loading is not payable on termination. If the status quo is maintained employers will continue to be liable for annual leave loading on termination for employees covered by these awards. There are also 77 modern awards which contain an entitlement to annual leave loading that are silent whether annual leave loading is to be paid on termination. The status quo requires these employers to pay annual leave loading on termination whereas they would not have been liable for these payments under the longstanding position which was replaced by the Fair Work Act.

It is not possible to determine how many employees are currently entitled to annual leave loading for a number of reasons. In relation to modern awards this is because in many workplaces the modern awards have been supplanted or supplemented by an enterprise agreement which may provide different conditions. For example, annual leave loading payable under the award may have been absorbed into a higher salary payable under an enterprise agreement. Additionally, in relation to modern awards and enterprise agreements, not all employees covered by the instrument may be entitled to annual leave loading, such as casual employees or those in specific roles excluded from the entitlement.

In relation to enterprise agreements the Department is not able to disaggregate the operation of annual leave loading terms, which may, for example, confirm or remove the entitlement for some or all employees. Application of any annual leave loading entitlement for each enterprise agreement can also not be ascertained due to information not being available on who may or may not be entitled to it, for example, how many employees are casual and therefore not entitled to leave loading. The database also does not include data on agreements that are still operational but have passed their nominal expiry date.

5.4.2 Option Two – Make annual leave loading payable on termination where provided for under the relevant industrial instrument

Benefit

Option two would implement the recommendation of the Review Panel (Recommendation 6) that the longstanding position be reinstated. Recommendation 6 reads:

> *The Panel recommends that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect* (page 100).

The benefits of reinstating the longstanding position are twofold—it will reduce unforeseen costs for many employers and will provide certainty for employers and employees. Specifically, option two would represent a reduction in costs for employers who have had to pay leave loading on unused leave to employees on termination because of the operation of section 90(2) of the Fair Work Act despite express provisions in the applicable modern award or enterprise agreement to the contrary.

This option will also provide clarity to employers and employees, avoiding disputes that may arise because of a lack of awareness that the longstanding position had been displaced by the Fair Work Act.

Cost

Option two would see a reduction in entitlements for employees who have, since 2010, received annual leave loading on unused leave on termination, despite provisions to the contrary in their industrial instruments. This option would of course not have any impact on employees unless they are terminated, have an annual leave accrual and an entitlement to annual leave loading, and has no impact on employees not entitled to annual leave loading. For affected employees, this would equate to the loss of a loading of around 17.5 percent on top of any holiday pay owed to them. However, affected employees would not have had this entitlement prior to the commencement of the Fair Work Act and will continue to be entitled to their base rate of pay for any period of untaken annual leave.

6. Transfer of business

6.1 Problem

The transfer of business provisions under the Fair Work Act provide protections for employees in situations where a business is transferred from one national system employer to another. Under these provisions an award or agreement or another type of 'transferable instrument' follows the employee and becomes binding on the new employer. The purpose of these provisions is to ensure employees' wages and conditions are not diminished in circumstances where for example a business changes hands or a business restructures its operations.

Employers can seek an order from the Fair Work Commission to stop the transfer of an award or agreement. The Review Panel noted this imposes an unnecessary administrative burden on employers where an employee has voluntarily transferred between associated entities (page 206). This is because in this situation the employee has retained control over whether they wish to transfer to the new terms and conditions, as they do so voluntarily.

6.2 Objective

The objective of amending the transfer of business rules is to reduce the red tape for employers associated with having to seek an order from the Fair Work Commission to stop an employee's industrial instrument transferring where they have voluntarily transferred between associated entities. The removal of this red tape will also encourage increased voluntary transfers between associated entities to the benefit of both employees and employers.

Transfer of business red tape is quantified as time and wages to prepare an application to stop the instrument transferring, negotiate union support for the application and prepare for a Fair Work Commission hearing. If an employer chooses not to seek an order from the Fair Work Commission, the industrial instrument will transfer with the employee, resulting in the significant cost of having to maintain multiple payroll systems due to the same group of employees being covered by more than one instrument.

6.3 Options

6.3.1 Option One – Maintain the status quo

Under this option employers will be required to continue to seek an order from the Fair Work Commission where an employee voluntarily moves between two associated business entities.

6.3.2 Option Two – Employees who voluntarily transfer be subject to the terms and conditions of employment provided by the new employer

This option implements Recommendation 38 made by the Review Panel by amending section 311 of the Fair Work Act to make it clear that when employees voluntarily seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer. Recommendation 38 reads:

> *The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer* (page 206).

6.4 Impact analysis

6.4.1 Option One – Maintain the status quo

Maintaining the status quo will continue to require employers to seek an order from the Fair Work Commission to stop an employee's industrial instrument transferring to the new employer where an employee voluntarily moves between two employers that are associated entities.

Option one will continue to place an administrative burden on employers in terms of time and resources in preparing an application to the Fair Work Commission, and as noted by the Review Panel may diminish 'opportunities for employees within the group structure due to the cost of seeking an order' (page 207). Alternatively the employer will have the cost of having different industrial instruments applying to the same group of employees.

While the quantified costs identified are not significant, the flow on effect of maintaining this option is the negative impact for both employers and employees through potentially reduced flexibility of mobility for employees between entities and the benefits this may have delivered to employees and their employers.

6.4.2 Option Two – Employees who voluntarily transfer be subject to the terms and conditions of employment provided by the new employer

This option will reduce the burden on employers of having to comply with administrative red tape following voluntary movements of employees between associated entities. It will reduce costs associated with an employer having to comply with a new industrial instrument that transfers with the transferred employee or the alternative of having to seek an order from the Fair Work Commission to stop an instrument transferring.

The Review Panel considered that amending section 311 is likely to have a positive impact for employees as it will encourage greater mobility, as well as benefitting the new employer of having experienced staff transferring to undertake the relevant work (page 207).

An amendment to section 311 was considered by the Review Panel as unlikely to increase the risks to employees of having their terms and condition of employment diminished through transfers to associated entities (page 206). The Review Panel's report noted that the Fair Work Commission has given weight to the fact that employees are transferring of their own initiative with an understanding of the terms and conditions of employment, in deciding that an industrial instrument should not transfer (page 206).

In addition, the Review Panel considered that while the process is relatively straightforward, it unnecessarily ties up parties' time (including that of the Fair Work Commission) in dealing with matters that could be resolved without recourse to the tribunal (pages 203-4).

6.5 Regulatory cost calculations

The Review Panel found that there was scope to reduce costs on employers through changes to treatment of transfer of business situations where an employee transfers between two associated entities voluntarily (see page 205). Under current rules, employees remain covered by their transferring instrument, in some cases, to their detriment. In these cases, employers are required to make an application to the Fair Work Commission for an order that the new employer's instrument applies to the employee.

The main costs associated with these transfers are administrative and relate to labour costs required to secure orders from the Fair Work Commission by making an application under section 318. The Review Panel noted that changes could 'spare both parties the time and expense of making such an application' (page 206). The Fair Work Commission does not charge a fee to make an application under section 318. There are also administrative efficiencies for employers who will no longer be required to maintain two different payroll systems in the event that the Fair Work Commission declines to make an order and the employee's instrument of appointment transfers with them.

To determine the reduction in the number of application processes caused by the change, the Department has analysed recent data regarding section 318 applications. The Fair Work Commission produces quarterly reports that collate information on various applications made under the Fair Work Act.

Over the 24 months to the end of September 2013 there were 137 applications and 114 orders granted under section 318. This translates to almost 70 applications per year. While there has been a slight increase in the July – September 2013 quarter, the number of applications per year has remained relatively stable. Based on this, it is assumed that employers will continue to make around 70 applications under section 318 per year.

The Review Panel found that most applications were granted and hearings were generally between half an hour and an hour. The Department analysed applications that have been made in regard to voluntary employee transfers. Based on this analysis, the Department estimates that around 10 per cent of section 318 applications deal with voluntary employee transfers.

The issue of voluntary employee transfer was highlighted by Qantas in its submission to the Review Panel. Qantas noted that all applications it has made in relation to voluntarily transferring employees have been successful, but that time and resources are required to prepare applications and secure union support (page 205).

Preparation for and representation at the Fair Work Commission hearing would be conducted by a Human Resources Manager and Human Resources Professional. The average weekly earnings before tax for these employees provided below are based on the Government's Job Outlook website and job and recruitment website data on indicative salaries. Hourly rates of pay have been calculated by dividing the weekly amount by 38 hours.

Table 4 - Employee earnings

Role	Weekly earnings	Hourly rate
Human Resources Manager	$2,300	$60.53
Human Resources Professional	$1,250	$32.90

The cost offset estimate in table 5 below has been made on the assumption that it would take around a week for the team acting for the employer to prepare the application, negotiate union support and prepare for the Fair Work Commission hearing. This assumption is informed by the findings of the Review Panel.

There are also likely to be a number of businesses where employees have transferred voluntarily and employers have not applied to the Fair Work Commission for an order under section 318. Under the regulation change, these businesses would no longer need to maintain a separate payroll system for the transferring employee. The offset includes efficiencies derived from employers being relieved from running multiple pay roll systems due to multiple agreement coverage for the same groups of employees.

In the absence of any data on the number of employers in this category, a conservative estimate is that the number of employers who do not apply for Fair Work Commission orders when an employee transfers voluntarily is equal to those that do apply for orders. An administrative cost saving has been included for these employers.

The annual cost offset has been calculated using the Business Cost Calculator.

Table 5 - Annual cost offset

	Agency	Within portfolio	Outside portfolio	Total
Business	$0	$87,870	$0	$87,870
Not-for-profit	$0	$0	$0	$0
Individuals	$0	$0	$0	$0
Total	$0	$87,870	$0	$87,870

7. Meeting to discuss extensions of unpaid parental leave

7.1 Problem

The NES contained in Part 2-2 of the Fair Work Act provide employees with a leave entitlement and return-to-work guarantee when taking parental leave. The provisions are intended to maintain the long-term employment relationship between the parents and the workforce by allowing working parents the flexibility to care for their children in important formative years without having to resign from their paid jobs.

Under the Fair Work Act an employee has the right to request an additional 12 months' unpaid parental leave after an initial 12 months' leave. The employer can only refuse such a request on reasonable business grounds and must provide written reasons for their decision if the request is refused. However, there is no statutory requirement for a request to be discussed in person with the employer.

Refusing a request to extend unpaid parental leave without due consideration and discussion about the reasons for the refusal can lead to disgruntled employees, and employees may make the decision to resign rather than return to work. A meeting may enable an employer to clearly explain the business reasons of their decision to the employee.

7.2 Objective

The objective of this amendment is to promote meaningful discussion and ensure due consideration of requests for extensions of unpaid parental leave before an employer makes a final decision about such requests. Employers will continue to be able to refuse such requests on reasonable business grounds.

7.3 Options

7.3.1 Option One – Maintain the status quo

If the status quo is maintained, employers will be able to continue to refuse an employee's request for extended unpaid parental leave on reasonable business grounds without meeting with the employee to discuss their request. The provisions require a refusal of a request to be made by the employer in writing not more than 21 days after the request is made.

7.3.2 Option Two – Require a meeting to be held before a request to extend unpaid parental leave can be refused

This option involves implementing the Government's election commitment to require that a meeting take place between the employer and the employee to discuss a request for an extension of unpaid parental leave unless the employer has already agreed to the request. This option was recommended by the Review Panel in recognition of the experience of some stakeholders with employers refusing such requests without due consideration (page 94 and page 99). Recommendation 3 reads:

> *The Panel recommends that s. 76 be amended to require the employer and the employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has agreed to the request* (page 94).

It is likely that a meeting would already form part of considering a request to extend unpaid parental leave despite the legislation not specifying the need for a meeting. However, the Review Panel was of the view that legislating for the requirement that a meeting be held to discuss the request would promote discussion between employees and employers and ensure due consideration of such requests in all workplaces (page 94 and page 99).

It should be noted that this option does not impose any further obligation on the employer to accept the request. This measure will provide an opportunity to discuss the employee's employment arrangements and business needs in a formal manner prior to the outcome of the request being decided. An employer will still be able to refuse a request on reasonable business grounds.

7.4 Impact Analysis

7.4.1 Option One – Maintain the status quo

Cost

Maintaining the status quo would not address the problem that some employees may be disgruntled about an employer's refusal and leave the workforce rather than return to work at a time when they are not ready to or because they feel that their employer has not duly considered their request for extended unpaid parental leave.

Benefit

Maintaining the status quo would avoid the cost of meeting with employees before a request is refused in circumstances where an employer would not already have a meeting to discuss such requests.

7.4.2 Option Two – Require a meeting to be held before a request to extend unpaid parental leave can be refused

Cost

The overall size of the regulatory impact of option two would be small. Results from Fair Work Commission data indicate that formal requests for extending unpaid parental leave are rare. Around one and a half per cent of employers received a written request for an extension of unpaid parental leave beyond their 12-month entitlement under the NES since 1 January 2010 (*General Manager's report into the provisions of the National Employment Standards* [General Manager's Report into

NES], page 58). Of the employers who received a single request, around 93 per cent granted the request without variation, 3.3 per cent accepted request with variation and 3.3 per cent refused the request (General Manager's Report into NES, page 66). Of employers who received multiple requests, around 92 per cent granted all of the requests without variation. Around seven per cent granted some requests without variation. Around three per cent of employers who received a single request and less than one per cent of employers who received multiple requests refused a request (General Manager's Report into NES, page 67).

Benefit

Option two would involve legislating that a meeting take place to discuss a request for extended unpaid parental leave before it can be refused. Requiring a meeting is likely to result in meaningful discussions between employers and employees in relation to such requests and increase the likelihood of a request being agreed to. It will also enable employers to explain their business needs/pressures to employees. This would largely benefit mothers who have been out of the workforce for a period of 12 months on paid or unpaid parental leave, who want to take an additional unpaid period of parental leave. It also benefits the mother's partner as it takes the pressure off them to commence leave in lieu of the mother being able to be the primary carer at home.

Agreement to requests for extension of unpaid parental leave may also decrease the number of employees who would resign from their job rather than having to return to work. This would have the benefit of employers being able to retain experienced longer term staff, which is likely to outweigh the cost of having a meeting. The employee would benefit by retaining their attachment to the workforce, making their transition back to work easier after a period of parental leave. The measure may therefore have a small positive impact on Australia's workforce participation rates.

If a request is not agreed to, an employee is likely to be more positive about it because of the meeting held, and its demonstration that there has been due consideration given to their request. Therefore, they may be more likely to continue working productively for the employer than if they felt their request had not been adequately considered or did not understand the reasons their employer had refused the request.

7.5 Regulatory cost calculation

The regulatory effect of this proposal on businesses Australia-wide is minimal. The General Manager's Report into NES, found that around 1.5 per cent of all employers had received a written request for an extension of unpaid parental leave under the NES since the provisions came into effect on 1 January 2010 (page 58). The data shows that around 5 per cent of those requests were refused.

Therefore each year the proportion of all employers who would refuse a request and be required to hold a meeting is very low, less than 0.05 per cent. There is no evidence available to suggest that this number will change significantly over time.

The Australian Bureau of Statistics estimates that the number of employing businesses in Australia at June 2012 was around 835,000. This is the most recently available data. This number also includes

not-for-profit entities that employ people however these cannot be isolated from the aggregate employing businesses figure and are therefore not separated in table 6 below.

On the basis that each year, less than 0.05 per cent of employers would be required to hold a meeting, approximately 250 employers across Australia each year would be required to hold a meeting to discuss a request to extend unpaid parental leave.

The Department considers that such a meeting would most likely be conducted by a Human Resources Professional or equivalently paid person and would take approximately half an hour. The average weekly earnings before tax for a Human Resources Professional is $1,250 as provided on the Government's Job Outlook website. The hourly rates would be $32.90 based on a standard 38 hour week. The business cost calculator adds automatic on-costs to all labour rates.

Based on these calculations, the compliance cost to businesses in Australia would be approximately $4770.00 per year.

The compliance costs and offsets discussed above have been calculated using the Business Cost Calculator over a ten year period. These are summarised in Table 6 below.

Table 6 - Annual cost offset

Sector/Cost Categories	Business	Not-for-profit	Individuals	Total by cost category
Administrative costs	$4770.00	$0	$0	$4770.00
Substantive compliance costs	$0	$0	$0	$0
Delay costs	$0	$0	$0	$0
Total by sector	$4770.00	0	$0	$4770.00

8. Consultation

8.1 Consultation with relevant stakeholders

In May 2013 the Government released its Policy outlining proposed changes to the Fair Work laws. It was released several months prior to the election to give interested stakeholders and the community more broadly an opportunity to consider proposed reforms to the Fair Work laws. Many of the proposed changes were recommended by the Review Panel that conducted the 2012 Fair Work Act Review.

Relevant stakeholders are:

- state and territory governments
- employers and employer organisations
- employees and unions.

The recommendations of the Fair Work Act Review were also the subject of wide ranging consultation by the previous government.

Stakeholders will continue to be consulted on the proposed changes to the Fair Work laws outlined in the Policy.

8.2 Formal consultation processes

There are four formal mechanisms for consulting with stakeholders on workplace relations issues.

The Select Council on Workplace Relations (SCWR) is a consultative forum for relevant state and territory ministers to discuss workplace relations, workers' compensation and work health and safety issues.

The National Workplace Relations Consultative Council (NWRCC) includes seven representatives from the Australian Council of Trade Unions and seven representatives selected from the Australian Chamber of Commerce and Industry, Australian Industry Group, National Farmers' Federation, Master Builders Australia and Business Council of Australia. These organisations are peak workplace relations bodies and, as such, are representatives of employer and employee associations more broadly.

The Committee on Industrial Legislation (CoIL), is a subcommittee of the NWRCC and meets when required to provide technical input on draft amendments prior to the introduction of workplace relations legislation.

The Senior Officials' Meeting (SOM) comprises senior state and territory officials and is a forum for the Commonwealth to consult on workplace relations, workers' compensation and work health and safety matters, as well as to consider draft legislation.

8.2.1 Select Council on Workplace Relations

The most recent Select Council on Workplace Relations (SCWR) meeting was held in Melbourne on 1 November 2013. The Chair and Minister for Employment, Senator the Hon. Eric Abetz, advised

members of the range of reforms outlined in the Policy to be implemented and members were invited to provide their views and inputs on the reforms.

8.2.2 National Workplace Relations Consultative Council

The National Workplace Relations Consultative Council meeting was held in Canberra on 25 November 2013. The Council Chair, Minister Abetz, advised the meeting of the Government's intention to implement changes to the Fair Work Act outlined in the Policy, and invited members to provide their views on the proposed changes.

Further consultation will also be undertaken by the Government via SOM and during the CoIL meeting on the draft legislation.

9. Conclusion

The Department recommends implementing the Government's workplace relations election commitments outlined in this document on the basis that they enable a significant reduction in red tape and compliance costs and are expected to have a positive impact on the productivity and overall economic performance of Australian industry. The reforms will improve clarity and certainty of the workplace relations system which will help businesses to grow and create new jobs while maintaining a strong and effective safety net for employees.

While some of the proposed changes have identified minor red tape and cost increases such as extending the period of unpaid parental leave by legislating a meeting must take place between an employer and employee to discuss this request; on balance these costs are far outweighed by the benefits of such proposals. Specifically:

- Setting realistic timeframes for the negotiation of greenfields agreements is expected to deliver benefits impacting positively on jobs and the Australian economy over the next 10 years.
- Refining right of entry rules is expected to reduce the disruption of excessive visits by unions for discussion purposes to workplaces delivering savings through reduced administration costs.
- Changes to the transfer of business rules for employees who voluntarily transfer between two business entities will deliver a reduction in overall costs to an employer and will deliver benefits in terms of administrative efficiencies to business as well as potentially increased mobility opportunities for employees.
- Removing restrictions to the scope of items that may be covered by Individual Flexibility Agreements will deliver benefits due to increased flexibility for employees and employers.

Red tape and compliance savings for these proposals are expected to be in the order of $70,723,974.

The overall budgetary impact on the Government is nil.

10. Implementation and review

The Government will introduce a Bill to implement the proposed measures in 2014. The drafting of the legislation to implement the proposed amendments to the Fair Work Act is considered to be relatively straightforward. Built into timeframes for implementation is the likelihood of a Senate inquiry into the Bill.

As part of its ongoing assessment of the workplace relations system the Government and Department will monitor the impact these legislative changes have on employers and employees to ensure they are achieving their intended purpose. The measures will also be subject to review as part of the Productivity Commission review of the workplace relations framework announced by Government and scheduled to commence in 2014.