Post-implementation review of the Fair Work Amendment Act 2013 (1 January 2014 provisions)
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The document must be attributed as the ‘Post Implementation Review of the Fair Work Amendment Act 2013 (1 January 2014 provisions).
Context for the Review

This post implementation review (PIR) of the Fair Work Amendment Act 2013 (the 2013 Amendment Act) is required because the then Prime Minister provided an exemption from the preparation of a Regulation Impact Statement for the legislation. The purpose of a PIR is to assess the impact of the regulation, whether the regulation remains appropriate and how effective and efficient it has been in meeting its objectives.


The provisions of the 2013 Amendment Act came into effect at different times. This PIR covers the provisions that came into effect on 1 January 2014, which are:

- Schedule 1, part 4 – changes to regular rosters or working hours:
  - established new rules for consultation about changes to regular rosters and working hours.

- Schedule 2 – modern awards objective:
  - amended the modern awards objective to require that the Fair Work Commission (FWC) take into account the need to provide additional remuneration for employees working outside normal hours.

- Schedule 3 – anti-bullying:
  - established an individual right of recourse to the FWC for people who have been bullied at work.

- Schedule 4 – right of entry:
  - gave the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes
  - amended the location of discussion provision to give permit holders access to the regular meal or break room for interviews and discussions if the union and employer cannot reach agreement on another reasonable location
  - required employers to facilitate transport to and/or provide accommodation at remote sites where no other transport or accommodation is available for union officials.

- Schedule 4A – consent arbitration for general protections and unlawful termination:
  - enabled the FWC to arbitrate general protections dismissal disputes and unlawful termination applications where the parties consent
  - aligned the time limit for making an unlawful termination application with the time limit of 21 days that applies for making general protections dismissal and unfair dismissal applications.

Chapter 1 of this report examines:
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- Schedule 1, part 4 – Consultation about changes to regular rosters or working hours
- Schedule 2 – Modern awards objective
- Schedule 4 – Right of entry amendments
- Schedule 4A – Consent arbitration for general protections and unlawful termination.

Chapter 2 of this report examines:

- Schedule 3 of the 2013 Amendment Act – the anti-bullying jurisdiction.

The following sources of evidence have been used to assess the changes to regulation:

- submissions from stakeholders affected by the amendments
- consultation with the National Workplace Relations Consultative Council (NWRCC)
- data provided by the FWC
- Productivity Commission Inquiry into the Workplace Relations Framework and submissions to that review
- House of Representatives Standing Committee on Education and Employment, Advisory Report into the *Fair Work Amendment Bill 2013*.

Provisions of the 2013 Amendment Act that came into effect on 1 July 2013 were assessed in an earlier PIR and encompassed changes to special maternity leave, concurrent unpaid parental leave, the right to request flexible working arrangements and transfer to a safe job for pregnant employees.
Chapter I

Schedule 1, part 4
Schedule 2
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Chapter 1

The purpose of the post implementation review

The purpose of a PIR is to assess whether the regulation remains appropriate and how effective and efficient it has been in meeting its objectives. This post implementation review (PIR) of the Fair Work Amendment Act 2013 (the 2013 Amendment Act) is required because the then Prime Minister provided an exemption from the preparation of a Regulation Impact Statement for the legislation.

1. Purpose of the regulation

Consultation about changes to regular rosters or working hours

The Fair Work Act, as originally passed by the Parliament, provided that enterprise agreements include a consultation term, which requires an employer to consult employees on major workplace changes that are likely to have a significant effect on them (s.205). Modern awards generally also included a consultation term with similar requirements, although consultation terms were not mandatory for modern awards.

The 2013 Amendment Act inserted new provisions for modern awards at s.145A and enterprise agreements at s.205(1)(a)(ii) to require employers to consult employees about changes to their regular roster or ordinary hours of work. The term ‘regular roster’ is not defined; however, the rostering protection applies to all employees with regular and systematic working hours, whether they are employed on a permanent or casual basis.

Under the new requirements, an employer must consult with employees about a change to a regular roster or ordinary hours of work by:

- providing information to the employees about the change
- inviting employees to give their views about the impact of the change, including any impact in relation to their family and caring responsibilities
- considering any views put forward by those employees about the impact of the change.

The consultation requirement does not prevent employers from making changes to rosters or working hours. However, the dispute resolution mechanism of the relevant modern award or enterprise agreement applies to the consultation requirements. This means that in circumstances where employers fail to comply with their consultation obligations, compliance with the new requirements may ultimately be enforced by application to a court.

The intention of the provision is to promote discussion between employers and employees who are covered by a modern award or who are party to an enterprise agreement about the likely impact of a change to an employee’s regular roster or ordinary hours of work. The 2013 Amendment Act requires that employers consider their employees’ family and caring responsibilities when changing regular working arrangements.

Modern awards objective

The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. The modern awards
objective at s.134 of the Fair Work Act sets out a number of factors that the FWC must take into account when setting, varying or revoking modern awards.

The modern awards objective required the FWC to consider a range of factors including, but not limited to:

- the need to encourage collective bargaining;
- the need to promote social inclusion through increased workforce participation; and
- the need to promote flexible modern work practices and the efficient and productive performance of work.

The 2013 Amendment Act inserted new paragraph s. 134(1)(da) so that the FWC must also take into account the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

Although many modern awards already provided penalty rates for non-standard working hours, the amended modern awards objective requires the FWC to specifically consider this issue.

Right of entry
The Fair Work Act (Part 3-4) provides permit holders (union officials) with the right to enter work premises for discussion purposes, to investigate suspected contraventions of workplace laws or instruments, or for workplace health and safety reasons. A permit holder must have a valid and current entry permit from the FWC and, generally, must provide 24 hours’ notice of their intention to enter the premises.

Location of discussions
The 2013 Amendment Act repealed and replaced the previous s.492 of the Fair Work Act. Previously if a permit holder exercised right of entry onto a premises to hold discussions or interviews, the permit holder was required to comply with a reasonable request by the occupier or employer to conduct interviews or hold discussions in a particular room or area of the premises. The permit holder could make an application to the FWC if it was considered that the room or area was not fit for purpose or the request was made with the intention of intimidating or discouraging persons from participating in discussions, or making it difficult for persons to participate in discussions because the room or area is not easily accessible during mealtimes or other breaks.

The 2013 Amendment Act inserted new subsection s.492(1) to provide that the permit holder must conduct interviews or hold discussions in the room or area of the premises agreed with the occupier of the premises. New subsections s.492(2) and (3) also provided that if there is no agreement, the default location for interviews and discussions will be any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose.

Transport and accommodation arrangements for remote workplaces
The 2013 Amendment Act inserted new sections s.521C and s.521D into the Fair Work Act that covers accommodation and transport arrangements for right of entry visits to remote worksites for
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discussion purposes. The amendments deal with circumstances in which permit holders and occupiers have been unable to reach agreement on accommodation and transport arrangements to facilitate right of entry to remote locations.

What is considered a ‘remote location’ depends on the particular circumstances but is limited to situations where the only realistic means for the permit holder to access the premises is by transport provided by the occupier or where the only accommodation at the location, if it is required, is that provided by the occupier.

The obligation to facilitate transport under s.521D(2) for permit holders only applies when the occupier and permit holder cannot agree on a transport arrangement to the remote location and the following matters are satisfied:

- to provide transport to the premises for the permit holder, or cause that transport to be provided, would not cause the occupier undue inconvenience
- the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, transport to the premises for the purpose of assisting the permit holder to exercise rights under this Part
- the request is made within a reasonable period before transport is required
- the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into a transport arrangement with the occupier by consent.

The obligation to facilitate accommodation under s.521C(2) for permit holders only applies when the occupier and permit holder cannot agree on an accommodation arrangement and all the following matters are satisfied:

- to provide accommodation, or cause accommodation to be provided, to the permit holder would not cause the occupier undue inconvenience
- the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, accommodation for the purpose of assisting the permit holder to exercise rights under this Part on the premises
- the request is made within a reasonable period before accommodation is required
- the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into an accommodation arrangement with the occupier by consent.

The amendment also limits the amount that an occupier can charge a permit holder for the transport and/or accommodation arrangements to cost recovery only. The occupier is unable to charge an additional fee for the services provided.

*Frequency of entry disputes*

The 2013 Amendment Act amended the right of entry provisions of the Fair Work Act to enable the FWC to deal with disputes about the frequency of right of entry visits for discussion purposes.

If the FWC determines that the frequency of entry would require an unreasonable diversion of the occupier’s critical resources, it can make any order it considers appropriate to resolve the dispute. This includes orders to suspend, revoke or impose conditions on entry permits or the future issue of entry permits to one or more persons or to make a recommendation.
The new powers of the FWC do not extend to frequency of entry to investigate suspected contraventions of a workplace law or instrument or for work health and safety reasons.

Consent arbitration
The 2013 Amendment Act amended s.369 of the Fair Work Act so that the FWC could arbitrate general protections dismissal disputes and unlawful termination disputes where the parties consent and a number of other steps have occurred.

If a dispute involves a dismissal under s.365 of the Fair Work Act the FWC must initially deal with the dispute other than by arbitration (which may include conciliation, mediation, expressing an opinion or making a recommendation). If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then the FWC will issue the parties a certificate stating these facts. It must also advise the parties if it considers that consent arbitration or an application to a court would not have a reasonable prospect of success. If the parties agree within 14 days of the issuance of the certificate, then the FWC can arbitrate their dispute. If one or both of the parties do not consent to arbitration by the FWC, the dismissed employee can choose to take the matter to a court.

In conducting consent arbitration, the FWC has its usual powers, and can make orders to reinstate the dismissed employee, compel the employer to compensate the employee (with no cap on the amount) or make orders about the continuity of employment and/or service.

The FWC cannot order an employer to pay penalties, unlike in a court application. Further, a party can only appeal a decision in circumstances similar to those in an unfair dismissal claim - where the FWC determines it is in the public interest and any alleged error of fact is significant.

The amendment also addressed procedural matters, including:

- new measures to limit appeals and provide for costs orders in certain circumstances
- ensuring that a dismissed employee will continue to be prevented from pursuing multiple remedies in relation to the dismissal
- aligning the time limit for making an unlawful termination application with the time limit of 21 days that applies for making general protections dismissal and unfair dismissal applications (previously 60 days). This is a minor, technical amendment to complete the alignment of application time limits commenced via the Fair Work Amendment Act 2012 (which was the subject of a Regulation Impact Statement assessed as adequate by the Office of Best Practice Regulation).

What other policy options were considered?
The department is not aware of any alternative proposals that may have been considered in the development of the provisions of the 2013 Amendment Act commencing 1 January 2014.

The current policy agenda
A number of the issues the 2013 Amendment Act sought to address are important policy considerations of the current Government. In late December 2014, the Government asked the Productivity Commission to undertake an inquiry into Australia’s workplace relations framework. The draft report was released on 4 August 2015 and the final report was provided to the Australian Government on 30 November 2015. The Productivity Commission has made 69 recommendations
and the Government has committed to undertake consultations with stakeholders in developing its response to the report.

The Government also introduced the Fair Work Amendment Bill 2014 into Parliament on 27 February 2014. Among other matters, the Bill sought to repeal or change a number of the amendments made by the *Fair Work Amendment Act 2013*, including:

- repealing the amendment that requires an employer or occupier to facilitate transport and accommodation arrangements for permit holders exercising entry rights at worksites in remote locations
- repealing amendments relating to the default location of interviews and discussions and reinstating the previous rules
- expanding the FWC’s capacity to deal with disputes about the frequency of right of entry visits to premises for discussion purposes.

The Fair Work Amendment Bill 2014 passed the Parliament on 11 November 2015 with amendments. The right of entry changes and a number of other parts of the Bill were removed by amendment in the Senate. These amendments were reintroduced by the Government on 3 December 2015 as measures in the Fair Work Amendment (Remaining 2014 Measures) Bill 2015, however this Bill lapsed at prorogation on 15 April 2016.
2. The case for change

The 2013 Amendment Act implemented the then government’s response to a number of recommendations of the 2012 Fair Work Act Review Panel (the Review Panel), as well as other changes arising from consultation with stakeholders following the release of the report.

The Review Panel’s final report: Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation was released on 2 August 2012. A number of the provisions in this PIR implemented or responded to recommendations put forward by the Review Panel. Other reasons for the amendments were set out in the Minister’s 2013 second reading speech. The case for change is further examined in the sections below.

Consultation about changes to regular rosters or working hours

The 2013 Amendment Act included new consultative requirements to require an employer to take into account an employee’s family and caring responsibilities prior to making changes to regular rosters and ordinary working hours. The case for government intervention was outlined in the then Minister’s 2013 second reading speech:

'We all arrange our lives around work commitments, so when work rosters change at short notice there is an impact not just on our work life, but also our family life. The unilateral imposition of changed rosters and working hours can cause particular hardship for people who have family caring responsibilities.

The amendments will place an obligation on employers to provide employees with information about changes to their roster or hours of work and consult with employees on the impact any changes will have, including on the employees’ family and caring responsibilities.

Employers must then consider any views the employees have about how the change will impact them before implementing any changes.

The proposed approach will ensure that when decisions on rostering and working conditions are made, they involve a consideration of the needs of both employers and employees.

The dispute resolution mechanisms of relevant workplace instruments will continue to apply in relation to consultation obligations in awards and enterprise agreements, including these new consultation requirements'.

There was no specific finding of the Review Panel about the need to implement this reform and the department is not aware of any other evidence relied upon to support its implementation.

Modern awards objective

The 2013 Amendment Act ensures that the FWC specifically consider the need for additional remuneration for working weekends, shifts work and other unsocial hours in its role to maintain the

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1 Minister for Workplace Relations, the Hon Bill Shorten MP, Second Reading Speech: Fair Work Amendment Bill 2013, 21 March 2013.
modern awards framework. The case for government intervention was outlined in the then Minister’s 2013 second reading speech:

‘the Government is seeking to ensure that work at hours which are not family friendly is fairly remunerated. This will be done by amending the modern awards objective to ensure that the Fair Work Commission, in carrying out its role, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends’.2

There was no specific finding of the Fair Work Act Review Panel about the need to implement this measure and the department is not aware of any other evidence relied upon to support its implementation.

Right of entry
The 2013 Amendment Act implemented the then government’s response to a number of the Review Panel’s recommendations on right of entry. The case for government intervention was outlined in the then Minister’s 2013 second reading speech:

‘We believe that the vast majority of trade unions and employer organisations are democratic and accountable to their members. We also believe that anyone in a position of trust or responsibility in a registered organisation must comply with the law. There are clear rules about right of entry in the Fair Work Act.

The Government’s policy intention when setting those rules [right of entry] and introducing the amendments in this Bill is to balance the right of employers to go about their business without undue interference with the democratic right of employees to be represented in the workplace and to participate in discussions with their union at appropriate times’.3

Location of discussions
Previously, an occupier of a premises would provide a location for interviews and discussions so long as the area or room they request a permit holder use was ‘reasonable’.

Union submissions to the Fair Work Act Review4 indicated that the previous arrangements for determining the location for discussions and interviews had undermined the ability of permit holders to access union members and eligible employees by denying employees the ability to meet union officials in the most convenient locations. While permit holders were not previously prevented from raising objections to a room or location, the occupier was not required to consider their views and this had resulted in inappropriate rooms being allocated, allegedly to make it difficult for employees to attend discussions in the time available or to intimidate employees from attending a meeting.

However, under the previous arrangements the permit holder was able to make an application under s.505 of the Fair Work Act to the FWC if the ‘room or area is not fit for the purpose of

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2 Minister for Workplace Relations, the Hon Bill Shorten MP, Second Reading Speech: Fair Work Amendment Bill 2013, 21 March 2013.

3 Minister for Workplace Relations, the Hon Bill Shorten MP, Second Reading Speech: Fair Work Amendment Bill 2013, 21 March 2013.

conducting the interviews or holding the discussions’, or the request to use a particular room or area was made with the intention of (superseded s.492 (2)(b)):

‘(i) intimidating persons who might participate in the interviews or discussions; or
(ii) discouraging persons from participating in the interviews or discussions; or
(iii) making it difficult for persons to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason’. 5

The case for government intervention was outlined in the then Minister’s 2013 second reading speech:

‘The Bill will also address the problem identified by the Review Panel in relation to disputes over the location for interviews and discussions between right of entry permit holders and eligible employees. In the vast majority of cases permit holders and employers agree on a suitable location for such visits without conflict.

In some workplaces however, evidence presented to the Review Panel showed that some employers had dictated that rooms be used which would discourage or intimidate employees from meeting with the union.

Permit holders are permitted under the Act to hold discussions with workers during mealtimes and other breaks. It is reasonable that, in clarifying the rules about location, we provide for discussions to occur in the locations where workers ordinarily spend their breaks.

The Bill therefore clarifies that in instances where a reasonable location for discussions can’t be agreed between the parties the discussions will be held in any room or area in which meal or other breaks are ordinarily taken by employees’. 6

The Review Panel did not recommend the changes to location of discussion included in the 2013 Amendment Act. It recommended that:

‘s. 492 and s. 505 be amended to provide FWA (Fair Work Australia) with greater power to resolve disputes about the location for interviews and discussions in a way that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience’. 7

Transport and accommodation arrangements for remote workplaces

Previously, transport and accommodation arrangements for access to remote worksites were agreed between occupiers, employers and permit holders or the union they represent. However, there was no mechanism to deal with circumstances where access to remote locations was disputed or refused, or there were disputes about the costs for transport or accommodation. The amendments aimed to address these issues by placing a facilitative obligation on the employer to provide

5 Fair Work Act 2009, ComlawID C2013C00469, s.492(2)(b), superseded, end date 31 December 2013.
6 Minister for Workplace Relations, the Hon Bill Shorten MP, Second Reading Speech: Fair Work Amendment Bill 2013, 21 March 2013.
transport and or accommodation required by a permit holder to access a remote worksite for
discussion purposes. The vast majority of remote sites where these arrangements apply would be
offshore work sites, mining sites and mining construction sites.

On access to and accommodation at remote worksites, the ACTU discussed instances of obstructions
that had occurred in a public hearing for the House Committee Inquiry into the Fair Work
Amendment Bill on 24 May 2013:

‘... there is a sub-category of industrial sites, particularly in the resources sector, where it is
simply impossible to access the site via normal commercial means, or under your own
recognition...Therefore you are dependent on the transport and accommodation the
employer provides, whether those are chartered flights of one form or another or vehicular
transport from some form of hub. The examples that have been set out in the submissions
that have been made by our affiliates go to the practical cases, where they are denied access
to that transport or they are offered access at very excessive costs- in other words, a
prohibitive cost which is, in our view and the view of our affiliates, more than it would have
cost the employer to provide in the first place’.  

The case for government intervention was outlined in the then Minister’s 2013 second reading
speech:

‘The Government believes that all Australian workers, regardless of the location of their
workplace, have a right to union representation and that unions should have fair access
those workers they are entitled to represent. For this reason the Bill will introduce an
obligation on an employer to facilitate access to travel and accommodation for permit
holders to access certain remote locations where access can only occur by the employer
assisting with transport or accommodation.

These new requirements will apply only where premises are not reasonably accessible by
transport other than that provided by the occupier of the premises or that the nature of the
premises means the permit holder is required to stay overnight and no accommodation other
than that provided by the occupier is reasonably available.

To ensure that the rights of employees and unions are balanced with the need of the
employer to carry on their business without undue interference, this obligation will not apply
if it would cause the occupier undue inconvenience. Furthermore, a permit holder or union
must make a request for transport or accommodation in a reasonable period of time before
that transport and/or accommodation is required’.  

In conducting this PIR, the department has not been able to identify any cases before the 2013
Amendment Act took effect where a right of entry permit holder had been denied access to
employer provided transport and/or accommodation that was required to access a remote worksite.
There was no specific finding of the Review Panel about the need to implement these measures.

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8 House Standing Committee on Education and Employment, inquiry into the Fair Work Amendment Bill 2013, Public
Hearing, Melbourne, 24 May 2013.
9 Minister for Workplace Relations, the Hon Bill Shorten MP, Second Reading Speech: Fair Work Amendment Bill 2013, 21
March 2013.
Frequency of entry disputes

The 2013 Amendment Act implemented the then government’s response to recommendation 35 of the Review Panel\(^{10}\) that the FWC be given greater power to deal with disputes about the frequency of right of entry visits.

A number of submissions to the Fair Work Act Review argued that some employers were being unduly burdened by excessively frequent visits to workplaces by permit holders for discussion purposes. The Review Panel found that the number of visits by some unions in some workplaces had had an excessive impact on some employers. The Review Panel therefore recommended that the FWC be given greater power to resolve disputes about the frequency of visits to a workplace in a way that balances the rights of occupiers and employers and those of unions.

The significance of the problem of excessive right of entry visits by union officials was outlined in the following submissions to the Review Panel:

‘In a survey of 245 employers conducted by Ai Group 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 FW Act, and 15 per cent reported fewer visits. AMMA noted a case study of an unnamed employer who had experienced more than 400 visits to one site between 1 July 2009 and October 2011.

An affidavit attached to the submission of CCIWA described the impact of visits on onshore resource construction projects in Western Australia. It indicated that at the ‘high end’ visits averaged 56 per month, or nearly 700 visits over the year, and that on one particular day there were 17 visits.

In CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture, the employer gave evidence of 217 entry requests having been made between 1 July 2009 and 27 October 2009 on a site where approximately 3,300 workers were engaged by 12 to 14 main contractors, and where up to 703 subcontractors worked’.\(^{11}\)

The Review Panel made the following recommendation in relation to right of entry frequency disputes:

‘The Panel recommends that s. 505 be amended to provide FWA with greater power to resolve disputes about the frequency of visits to a workplace by a permit holder in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience’.\(^{12}\)

(Recommendation 35)

The case for government intervention was outlined in the then Minister’s 2013 second reading speech:

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‘The Government’s policy intention when setting those [right of entry] rules and introducing the amendments in this Bill is to balance the right of employers to go about their business without undue interference with the democratic right of employees to be represented in the workplace and to participate in discussions with their union at appropriate times.

*In almost all cases entry to workplaces by permit holders involves no disruption to a business’ operation. The Review Panel was however concerned that in some workplaces the frequency of visits by some unions was imposing a significant burden on employers in dealing with those visits.*

*It therefore recommended that the Fair Work Commission should have greater powers to deal with disputes about the frequency of right of entry visits to a workplace.*

*The Bill will implement that recommendation and give the Fair Work Commission the capacity to deal with disputes about the frequency of visits to hold discussions. The Fair Work Commission will be able to make any order it considers appropriate if satisfied that the frequency of visits by a permit holder or permit holders of the one union would require an unreasonable diversion of the occupier’s critical resources*.  

**General protections and unlawful termination**

**Consent arbitration**

Previously, if a general protections dismissal claim or unlawful termination claim could not be resolved between the parties at a conference before the FWC, the applicant would have to pursue their claim through the Federal courts system. Pursuing an outcome through the Federal courts can involve significant legal costs for both parties, and can discourage people with a legitimate claim from pursuing a fair outcome.

The changes in the 2013 Amendment Act address this issue by providing access to a faster, less expensive and less formal alternative to court proceedings by allowing the FWC to arbitrate the dispute with the consent of both parties.

There was no specific finding of the Review Panel about the need to implement this measure.

**Time limit for making an unlawful termination application**

The 2013 Amendment Act reduced the timeframe for making a claim of unlawful termination from 60 days to 21 days for consistency with general protections dismissal and unfair dismissal claims. Aligning the timeframes has reduced the potential for a dismissed employee from pursuing multiple remedies in relation to a dismissal that could otherwise be burdensome for the employer to reply to multiple applications. This was a minor, technical change that ensures the same rules apply to claims brought by national system employees (i.e. under general protections or unfair dismissal provisions) and non-national system employees (under the unlawful termination provisions). This completes the intended effect of a recommendation from the Review Panel.

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13 *Minister for Workplace Relations, the Hon Bill Shorten MP, Second Reading Speech: Fair Work Amendment Bill 2013, 21 March 2013.*
3. Consultation

Consistent with the PIR requirements, the National Workplace Relations Consultative Council (NWRCC) was consulted as it is the relevant Ministerial Advisory Council. NWRCC delivers a regular and organised means by which senior representatives of the Australian Government, employers and employees consult on workplace relations and labour market matters of national concern.

On 2 September 2015, the department wrote to NWRCC members to seek input into the second PIR of the 2013 Amendment Act. State and territory governments were also invited to participate with letters sent to Senior Officials on 2 September 2015. Submissions were open to any interested parties from 21 September 2015, with information about the PIR available on the department’s website. Submissions closed on 14 October 2015, however some extensions were granted. All submissions received by the department were accepted and 14 submissions were received in total.

NWRCC members were invited to provide advice to the department on their views regarding the extent and nature of the problem(s) that the 2013 Amendment Act was intended to address, the objectives of government action, the impact of the regulation and whether the government’s objectives could be achieved in a more efficient and effective way. As well as their views on these issues broadly, the department requested any data, information or advice on the operation of the provisions from their perspective.

The department drafted specific questions for members of NWRCC to help them in providing input into the PIR – some NWRCC members circulated these questions to their own member groups. The questions prompted NWRCC members to consider whether they had been involved in any processes under the 2013 Amendment Act and whether there was a regulatory cost associated with the amendments, both in terms of time and money.

The principal position of each stakeholder provided in their submission to this PIR is outlined in table 1 below.

TABLE 1: HIGH LEVEL SUMMARIES OF STAKEHOLDER SUBMISSIONS

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Overall position</th>
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<tbody>
<tr>
<td>1. Australian Chamber of Commerce and Industry (ACCI)</td>
<td>Recommends that the provisions should be repealed on the basis that either there was no evidence as to its necessity and considers the amendments were not subject to an adequate consultation process or regulatory impact assessment. ACCI recommends that the general protections provisions should be repealed and replaced with pre-Fair Work provisions. Pending this, the consent arbitration provision should continue to operate.</td>
</tr>
<tr>
<td>2. Australian Council of Trade Unions (ACTU)</td>
<td>The ACTU and affiliates are generally supportive of the provisions and consider that the amendments are largely working well and leading to positive outcomes.</td>
</tr>
<tr>
<td>3. Australian Federation of</td>
<td>The amendments have operated as AFEI had envisaged and have imposed additional regulatory obligations on employers in the</td>
</tr>
</tbody>
</table>
## Stakeholder

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Overall position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employers and Industries (AFEI)</td>
<td>management of their workplaces along with unnecessary prescription and complexity. Generally opposes the amendments and supports repealing provisions of the 2013 Amendment Act.</td>
</tr>
<tr>
<td>4. Australian Industry Group (AiG)</td>
<td>Views the 2013 Amendment Act as lopsided in favour of employees and unions and argues that it did not respond to any of the recommendations from the Fair Work Act Review that were beneficial to employers. Opposes the amendments and supports their repeal.</td>
</tr>
<tr>
<td>5. Australian Mines and Metals Association (AMMA)</td>
<td>Generally opposes the amendments and supports their repeal. On the right of entry changes, AMMA maintains that the amendments are flawed, unbalanced, open to abuse and encourage disputes. Maintains that there was no evidence for further consultation clauses in modern awards and enterprise agreements on top of what existed previously.</td>
</tr>
<tr>
<td>6. Chamber of Commerce and Industry of Western Australia (CCIWA)</td>
<td>The amendments were outside the recommendations or have little resemblance to the recommendations made in the 2012 Fair Work Act Review. Generally support repeal of provisions in the 2013 Amendment Act. Argues that the FWC should have greater capacity to address disputes regarding frequency of entry to hold discussions.</td>
</tr>
<tr>
<td>7. Housing Industry Association (HIA)</td>
<td>The HIA notes that it opposed the amendments in previous submissions to the 2013 Senate Inquiry into the Bill. HIA’s position remains that the amendments ignored the practical and economic relativities faced by many employers. The amendments are inconsistent with the Australian Government’s cutting red tape principles and shifted the regulatory balance in favour of employees by ignoring the needs of employers, particularly small business employers. Generally supports repeal of the provisions and a return to pre-Fair Work provisions.</td>
</tr>
<tr>
<td>8. Master Builders Australia (MBA)</td>
<td>Generally supports repealing provisions in the 2013 Amendment Act as they are considered to impose an unreasonable cost to business, are inflexible or provide unreasonable benefit to other parties. Aligning the time limit for making unfair dismissal or general protections applications to 21 days adds consistency and is viewed positively.</td>
</tr>
<tr>
<td>9. National Farmers’ Federation (NFF)</td>
<td>Supports repeal of the remote transport and accommodation requirement. Recommends limiting formal consultation requirements to circumstances where a major workplace change is proposed. Recommends the modern awards objective amendment be repealed or revised. Considers that changes to</td>
</tr>
<tr>
<td>Stakeholder</td>
<td>Overall position</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>the Fair Work Act right of entry provisions has provided union representatives with unequal bargaining power.</td>
</tr>
<tr>
<td>10. National Retail Association (NRA)</td>
<td>Considers that the <em>General Retail Industry Award 2010</em> previously provided adequate roster protections to retail employees and that the additional consultation requirement is not necessary and should be removed. Supports repeal of the amendment to the modern awards objective. The consent arbitration provision should be repealed as there is not much practical utility for the FWC to arbitrate general protections and unlawful dismissal disputes by consent.</td>
</tr>
<tr>
<td>11. Queensland Government – Queensland Treasury</td>
<td>Supports the current workplace relations framework and considers that it is crucial that industrial relations laws continue to evolve and remain relevant to a modern workplace.</td>
</tr>
<tr>
<td>12. Restaurant and Catering Australia (RCA)</td>
<td>The 2013 Amendment Act has exacerbated the regulatory burden that has a negative impact on the commercial viability of small and medium sized businesses. Notes that the modern awards objective has limited the ability to reduce penalty rates during core operational hours under the four yearly review process. Considers the right of entry provisions to be excessively convoluted and requires provisions to be read in conjunction with FWC case law.</td>
</tr>
<tr>
<td>13. South Australian Government – SafeWork SA</td>
<td>Confirmed support for the 2013 Amendment Act, specifically the amendments requiring consultation for changes to roster and the working hours and changes to the modern awards objective in relation to penalty rates.</td>
</tr>
<tr>
<td>14. Western Australian Department of Commerce</td>
<td>Supports repeal of the right of entry obligation to provide transport and accommodation to remote work locations as the provision is unjustified and excessively onerous. Supports the repeal of the modern awards objective amendment, arguing that this would lead to a more balanced consideration of, among other matters, appropriate levels of penalty rates in modern awards.</td>
</tr>
</tbody>
</table>
4. Regulatory impact of the Fair Work Amendment Act 2013

Quantitative analysis and specific qualitative feedback

Feedback from stakeholders on the 2013 Amendment Act varied. Employer groups generally oppose the amendments and would like them repealed. Common reasons given by employer groups for repealing the amendments included that they were not necessary in the first place, were not subject to proper consultation, and create duplication or are not effective. Conversely, the ACTU and affiliated unions were supportive of the amendments and consider that they are beneficial and achieving positive outcomes. The South Australian and Queensland governments were also supportive of the amendments. The Western Australian government was critical of some of the changes.

In undertaking this PIR, the department used data and information from a number of sources to assist in assessing the regulatory impact of the amendments.

The department notes that some of the costs identified by stakeholders do not form part of the Australian Government’s Regulatory Burden Measurement (RBM) framework. For example, there can be financial costs from pursuing or defending matters in tribunals or court proceedings, however these costs are excluded under the RBM framework.

The department has considered costs associated with becoming familiar with the new regulatory requirements, but does not expect these to be significant. The changes largely relate to matters that a normally efficient business would be expected to remain aware of in the course of managing their human resource management and workplace responsibilities. Although the amendments represent a change from past practice, and in some cases a relatively substantial change, becoming familiar with the new requirements is not considered to be overly complex and therefore unlikely to involve significant costs for employers.

It is noted that the Government freely provides information to employees and businesses on their workplace obligations through the Fair Work Infoline and Small Business Helpline.

The specific quantitative and qualitative elements of each amendment are considered in further detail below.

Consultation about changes to regular rosters or working hours

As previously outlined, the effect of this amendment is to provide that, where a change to regular rosters or ordinary hours of work (which may impact upon an employee, particularly in relation to his or her family and caring responsibilities) does not constitute a ‘major workplace change’, an employer will nevertheless be required to engage in consultation with the employee about the change and impacts raised by the employee.

Previously under the Fair Work Act, enterprise agreements were required to include a consultation term, which required an employer to consult employees on major workplace changes that were likely to have a significant effect on employees. Modern awards generally also included a consultation term with similar requirements, although consultation terms were not a mandatory inclusion for modern awards.
A number of submissions to this PIR noted that modern awards and enterprise agreements already contained provisions regarding rostering of employees and variation of hours. For example, the National Retail Association considered that prior to the introduction of the consultation provision, retail employees were already afforded adequate protection through a number of mechanisms. This includes general principles of contract law, the right to request flexible working arrangements insofar as any proposed changes to rosters may impact their carer’s obligations and relevant clauses in Modern Awards such as clause 28.14(d) in the General Retail Industry Award 2010:

‘Any permanent roster change will be provided to the employee in writing with a minimum seven days’ notice. Should the employee disagree with the roster change, they will be given a minimum of 14 days written notice instead of seven days, during which time there will be discussions aimed at resolving the matter...’

In addition, Division 5 of Part 2-4 of the Fair Work Act specifies that an enterprise agreement must include a term requiring an employer to consult about major workplace changes that are likely to have a significant effect on employees. Changes to working hours or rosters that affect multiple employees would typically be considered under this provision as a major workplace change as it would have a significant impact on employees. Consultation on changes to rosters and working hours would also have previously occurred in a formal context where consultation practices were written into company workplace policies and documents.

Due to the requirement for consultation clauses in enterprise agreements and the prevalence of such clauses in modern awards, the department is of the view that the majority of employers would have already engaged in formal or informal consultation processes for roster changes, even though they were not specifically required to do so by the legislation. The department considers that this consultation would have occurred as a normal part of organising working hours to ensure employees were available and able to work the new hours. This is supported by evidence presented in stakeholder submissions, such as the National Retail Association submission noted above. CCIWA and the Housing Industry Association also argue in their submissions that the new requirements overlap with existing obligations under many awards and agreements.

The costs to business who would have previously consulted their employees on roster changes are excluded from consideration under the RBM framework as RBM calculations are to measure regulatory burden over and above what a normally efficient business would pay. A normally efficient business is defined as a regulated entity that handles its regulatory tasks no better or worse than another. An explanation of these cost exclusions is available in the ‘Regulatory Burden Measurement Framework’ guidance note released by the Office of Best Practice Regulation—see business-as-usual costs.14

Research undertaken by the department indicates that there is no available data that can be used to estimate the economy wide impact of this amendment. Specifically, there is no data on the number of changes to regular rosters or ordinary hours of work that occur throughout the Australian economy each year that would enliven the requirements of the amendment. Submissions received

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14 Department of Prime Minister and Cabinet, Office of Best Practice Regulation: Regulatory Burden Measurement Framework Guidance Note, February 2015.
did not provide any information as to the extent that regular roster or working hour changes occur or how long associated consultations are likely to take.

There is also no way to identify how many employers would have already consulted with their employees regarding changes to regular rosters or working hours, however the department assumes that the vast majority of employers would have consulted in some form for the reasons outlined above. For the unknown minority of employers and their employees that did not previously undertake a consultation process, the amendment has provided a formalised consultation process that would be equivalent to standard business practice for a normally efficient business.

The department requested data from the FWC on the number of applications and orders made in relation to disputes under the consultation terms of enterprise agreements and modern awards. A low number of applications and orders would imply the provision has not been used significantly to enforce consultation on roster changes. Unfortunately this data was not available as the FWC does not specifically categorise applications and orders or decisions regarding disputes about consultation terms.

In its submission to this PIR, Master Builders Australia did comment generally about the provision:

‘Members have had exposure to consultation obligations which have generally spanned 5-10 days with then a full pay cycle’s notice before any introduction of change. Human resources staff, the relevant employee and their direct supervisor were involved in the consultations’ (page 3).

The department notes that MBA’s submission talks in a general sense about members’ experiences with the requirement, with consultation generally spanning between five to ten days. The submission also notes that a human resources staff member, the employee and direct supervisor were involved in the consultation process. The submission does not specify the time involved for each staff member to complete the consultation process.

**Costing: Consultation about changes to regular rosters or working hours**

The department did not receive any quantitative information on the perceived regulatory compliance burden of the amendment.

**Roster changes per annum**

There is no available data that the department can use to estimate the number of regular roster or ordinary work hours per year, although it could be expected to be in the tens of thousands every year.

**What would consultation likely include?**

In its submission the MBA indicated that consultation generally spanned 5-10 days and involved a human resources staff member, the relevant employee and their direct supervisor. Consultation would be diverse and dependent on a number of factors. For example, a small business would be more likely to have consultation involving only the relevant employee and manager. The amount of time the consultation would take would also be highly variable. This PIR received no evidence that specified the time involved in consulting.
**Business-as-usual**

The department expects that majority of businesses would have already consulted their employees on changes to regular work hours regardless of the new amendment. This view is based on a number of factors including consultation clauses already existing in enterprise agreements and modern awards (albeit only for major workplace changes), requirements in a number of modern awards and agreements to consult employees about roster changes, and other formal and informal consultation requirements that would have previously existed in company workplace policies. The department also expects that the majority of employers would already have consulted on roster changes regardless of any formal or informal requirements as a part of good management practice.

Under the RBM framework, calculations are to measure regulatory burden over and above what a normally efficient business would pay in the absence of the regulation. A normally efficient business is defined as a regulated entity that handles its regulatory tasks no better or worse than another. In this case, the PIR considers that a normally efficient business would have previously consulted on changes to regular rosters or working hours and therefore the amendment has not increased regulatory compliance costs.

**Total estimated regulatory cost across the economy**

The total annual regulatory cost is estimated at $0 across the Australian economy.

This costing is consistent with some of the qualitative feedback received from a number of employer groups, who argued that the amendment was a duplication existing requirements. The amendment would have added compliance costs only to employers that did not previously consult their employees on changes to regular rosters or work hours to the standard established by the new requirements. These employers are considered to not be ‘normally efficient’ for the purpose of this PIR.

In its submission to this PIR, the ACTU noted that comments it had received from its affiliated unions have been supportive of the application of the requirement in the bargaining space. The ACTU stated that:

‘...the term has narrowed the areas of disagreement in bargaining and that Fair Work Commission dispute resolution conferences (triggered by the joint operation of the default consultation term and the dispute resolution term) have facilitated a genuine exchange of information between parties about significant changes to rosters, the reasons for those changes and their impacts’ (page 1).

In its Inquiry into the Workplace Relations Framework, the Productivity Commission did not make a specific recommendation about the consultation requirement for changes to regular rosters or working hours. However, it did note some studies that suggest that workplaces that include employees in change processes perform better (Farmakis-Gamboni et al. 2014, p. 20). It also noted that:

‘Arguably, if there were clear benefits from cooperation, good business managers would have incentives to promote it. Equally, poor managers may not. Mandatory requirements may also reduce the goodwill from voluntary arrangements. As with a number of other
regulated aspects of the Fair Work arrangements, what is in principle desirable is at risk due to process and an emphasis of form over substance — for example, where the apparent threat of a ‘failure to consult’ becomes an industrial lever rather than a desirable part of a non-adversarial environment... ‘ (page 688).

While noting that there appears to be benefits from consulting employees regarding change, the Productivity Commission indicated that mandatory requirements may shift how consultation is perceived.

i. **How did the amendment to consult about changes to regular rosters or working hours affect employers?**

The amendment to consult about changes to regular rosters or working hours did not appear to increase regulatory compliance costs for the majority of employers. The department considers that the majority of employers would have consulted on changes to their employee’s regular rosters or work hours prior to the amendment. The amendment has created a mechanism to ensure that outlier employers that did not consult on changes to their employees’ regular rosters or work hours are now required to. Although employers are now required to undertake genuine consultation, there is no restriction on changing regular rosters or work hours after genuine consultation has occurred.

ii. **How did the amendment to consult about changes to regular rosters or working hours affect employees?**

The amendment requires employers to consult with employees when changing regular rosters or ordinary hours of work, which is a benefit to employees. The amendment ensures that consultation extends to employees and their families who previously may not have been consulted about a change to their regular work hours because it did not constitute a ‘major workplace change’.

The department considers that the amendment provides a small net benefit (with no regulatory cost) to the community due to the requirement for employee consultation, which may help to mitigate the impact of proposed changes to regular work patterns on employees with family and caring responsibilities. This is because, prior to the amendments, work arrangements or rosters could be changed by an employer without the need to consult. This had the potential to pose challenges for employees with family, caring or other responsibilities.

The department considers that in most workplaces consultation would have already occurred in the ordinary course of an employer’s relationship with their employees. The amendment, however, provides a small overall net benefit by further encouraging dialogue between employers and employees and by ensuring that in all circumstances employees will be consulted about changes to their regular work or roster arrangements.

**Modern awards objective**

This amendment requires the FWC to take into account the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, working weekends or public holidays and working shifts.
The amendment ensures that the FWC now specifically considers these matters when reviewing modern awards. The FWC has retained the right to determine whether penalty rate provisions of a modern award are appropriate and the levels they should be set at based on the evidence presented to it. Prior to the amendment many modern awards already provided for penalty rates for unsocial working hours.

Submissions received from employer groups generally support repealing the amendment to the modern awards objective on the basis that there was no supporting evidence demonstrating why it was needed. Employer groups also argued that the amendment would impede the FWC’s ability to assess the merits of any application to review penalty rates in modern awards and for modern awards to be updated to reflect current social and economic challenges.

In its submission to this PIR, the MBA supported the Productivity Commission’s view in its Inquiry into the Workplace Relations Framework that legislative amendments to the modern awards objective are necessary to achieve greater clarity on the requirement. In its final report the Productivity Commission noted that:

‘...in practice, it seems that the FWC has not slavishly adhered to the ‘need’ to provide additional remuneration for working at asocial times, since it has not rushed to incorporate penalty rates into the multitude of awards that do not include them. However, the FWC (FWCFB 2014 para 295) has interpreted its freedom as partial, noting that the modern award objective ‘requires additional remuneration for working on weekends’.

On the other hand, in a decision relating to overtime, the FWC observed that s. 134(1)(da) of the Fair Work Act does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime.

In an effort to clarify the aims of the awards system, the Productivity Commission’s Final Report in its Inquiry into the Workplace Relations Framework recommends that the current modern awards objective be replaced – including the reference to additional remuneration. The proposed new objective lists five factors to be considered by the wage regulator: the needs of the employed; the need to increase employment; the needs of employers; the needs of consumers; and the need to ensure modern awards are easy to understand.

In its submission, the ACTU and affiliated unions noted that the change to the modern awards objective has not attracted much consideration apart from its relevance to the FWC Full Bench appeal from the 2012 modern awards review decision concerning penalty rates in the Restaurant Industry Award 2010 (Restaurant Award). In its submissions to this PIR, the ACTU considered the amendment to the modern awards objective:

‘...did not prove to be a barrier to a consideration of the merit of the penalty rates there considered (nor their reduction)’ (page 1).

16 Fair Work Commission Full Bench Decision (July 2015) - 4 yearly review of modern awards—Common issue—Award Flexibility (AM2014/300).
In this matter, the Restaurant and Catering Association of Victoria (RCAV) successfully appealed the decision of Deputy President Gooley on 10 October 2013 concerning the two-yearly review of the Restaurant Award. In this decision, the Deputy President rejected a large range of proposals to reduce pay rates for small businesses, abolish weekend penalty rates and modify the classification structure. RCAV’s appeal only challenged limited aspects of the Deputy President’s decision, namely the refusal to grant an alternative application to reduce the Sunday penalty rate in the Restaurant Award from 50% to 25% and four specific changes to classification structure. On 14 May 2014 the FWC Full Bench decided by majority that:

‘Although a 50% Sunday penalty rate is generally appropriate for employees under the Restaurant Award, for transient and lower-skilled casual employees working mainly on weekends, who are primarily younger workers, the superimposition of the casual loading of 25% in addition to the 50% penalty tends to overcompensate them for working on Sundays and is more than is required to attract them for work on that day.

In that respect, the Restaurant Award is not meeting the modern awards objective in s.134 of the Fair Work Act 2009...transient and lower-skilled casual employees will primarily be employed in the Introductory Level classification or in the Level 1 and Level 2 pay grades. Accordingly, effective from 1 July 2014, the Restaurant Award shall be varied to provide that for casual employees in these classifications, the Sunday penalty rate together with the casual loading should not exceed 50% in total...’

The Western Australian Department of Commerce was the only state government body to comment specifically on the amendment to the modern awards objective in its submission. It commented that:

‘...the modern awards objective already requires the FWC to ensure that modern awards provide a fair and relevant safety net, taking into account relative living standards and the needs of the low paid, even without section 134(1)(da) the FWC is required to take the needs of employees into account in considering penalty rates or any other terms and conditions in modern awards...Removal of section 134(1)(da) would lead to a more balanced consideration of, among others matters, appropriate levels of penalty rates in modern awards’ (page 1-2).

The department notes that since the commencement of the amendment on 1 January 2014, penalty rates have not been introduced into modern awards where they had not previously existed. On this basis, there is no change to the level of regulatory compliance costs for employers.

It may be too early to tell whether the amendment to the modern awards objective has reduced the FWC’s ability to lower or remove penalty rates in modern awards on the merits of an application. In the two years of operation, the amendment has only been tested on one occasion. However, the department notes that the amendment cannot be conceived as a complete barrier to reducing penalty rates following the Restaurant and Catering Association of Victoria appeal that led to a reduction in Sunday penalty rates for some workers as described above.

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17 Appeal against decision [2013] FWC 7840 of Deputy President Gooley at Melbourne on 10 October 2013 in matter number AM2012/180 and others.
A longer period of time may be required to further ascertain the impact of the amendment. The department notes that the Productivity Commission has made a recommendation that Sunday award penalty rates be aligned with the existing Saturday award penalty rates for permanent employees in the hospitality, entertainment, retail, restaurant and café industries.\(^{18}\)

**Costing: Modern awards objective**

This provision did not add any additional regulatory burden on employers because to date the provision has not led to increased penalty rates or the insertion of penalty rates into modern awards where they had not previously existed.

The provision requires the FWC to specifically consider the need to provide additional remuneration in modern awards for a number of non-standard working hours. The time and cost for the FWC to consider the provision when reviewing modern awards is excluded under the RBM framework as the cost of government-to-government regulation is not required to be considered in a regulatory costing.

**Total estimated regulatory cost across the economy**

The total annual regulatory cost is estimated at $0 across the Australian economy.

1. **How did the modern awards objective amendment affect employers?**

   The amendment to the modern awards objective has not affected the majority of employers, as it has not been used as the basis to increase penalty rates or introduce them into awards where they previously did not exist.

   A notable decision of the FWC since the introduction of the amendment has seen penalty rates reduced on Sundays for some workers covered under the *Restaurant Industry Award 2010*. This decision was not a result of the amendment to the modern awards objective, however, it does show that the amendment has not created a barrier to reducing penalty rates in modern awards.

2. **How did the modern awards objective amendment affect employees?**

   The amendment has not affected the majority of employees, as it has not been used as the basis to increase penalty rates or introduce them into awards where they previously did not exist.

**Right of entry**

**Transport and accommodation arrangements for remote workplaces**

This amendment has a very narrow application, only being relevant to some remote workplaces in circumstances where the right of entry permit holder and occupier are unable to reach an agreement. What is considered a ‘remote location’ is limited to circumstances where the only realistic means for the permit holder to access the premises is by transport provided by the occupier or where the only accommodation at the location, if it is required, is that provided by the occupier.

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The 2013 Amendment Act specifies a number of requirements to be met before an employer must enter into a transport or accommodation arrangement with the permit holder.

An employer may charge the permit holder a fee for accommodation or transport, but only one which is no more than necessary to cover the cost to the occupier of the accommodation and/or transport being provided.

The occupier is therefore unable to recover ancillary costs such as administrative expenses incurred in organising transport and accommodation for permit holders. These costs could include allocating a staff member/s to organise transport or space on existing transport already scheduled, liaising with the permit holder or the union they represent about the arrangements, ensuring there is adequate accommodation available on site and time spent on cost recovery from the permit holder or union they represent. These ancillary costs are considered to be red tape for the purposes of costing the impact of the amendment.

The department notes that the Fair Work Amendment Bill 2014 as introduced included provisions to repeal the transport and or accommodation requirements. A number of employer submissions noted this and support repealing the provision. They submitted that the provisions are impractical, often dangerous, unnecessary, costly and excessively onerous.

In its submission to this PIR, the Australian Industry Group stated that:

‘These provisions are structured such that where the employer and the permit holder cannot agree, the default position is that the employer (or occupier) must enter into an accommodation and/or transport arrangement with the permit holder and the employer (occupier) is responsible for providing the accommodation and/or transport. The default position removes any incentive for the permit holder and the organisation of which the permit holder is an official to negotiate a sensible accommodation and transport arrangement which suits all parties, including the employer’ (page 12).

In its submission to this PIR, AMMA stated that:

‘While there has not been a large documented increase in requests for remote site visits via employer-facilitated transport and accommodation, AMMA and its members remain opposed to these provisions and maintain they should be removed in line with the government’s pre-election policy, and as the Fair Work Amendment Bill 2014 in its original form sought to do’. (page 16)

In its submission to this PIR, the ACTU was supportive of the 2013 amendment:

‘Since the amendments took effect, some employers on large remote projects in WA have voluntarily negotiated arrangements to facilitate union access whereas prior union experience on similar projects is of much more resistance to coming to such an arrangement.

These negotiations occurred without resort to any reliance on the explicit rights conferred by the amendments or the dispute resolution procedure that applies.

Other affiliates report that, in the offshore areas, there has been an occasional need to draw an employer’s attention to these provisions, but they have been able to make arrangements
The ACTU’s comments indicate that the amendment could be lowering the number of disputes in this area due to the legislative obligation for employers to provide transport and accommodation to facilitate right of entry visits. It is notable that the ACTU has indicated that employers in offshore areas often do not request the permit holder to contribute to the cost of transport.

The Western Australian Department of Commerce was the only government submission to comment specifically on the remote workplaces amendment in its submission to this PIR:

‘The obligations imposed on employers by the FWA Act 2013 requiring employers to provide transport and accommodation for permit holders to access workplaces in remote locations are excessively onerous and unjustified in the Western Australian Government’s view. The Western Australian Government supports their repeal, as proposed by the Fair Work Amendment Bill 2014...’ (page 2).

The Department considers that this amendment is meeting its objective in that employers who may previously have not agreed to provide transport and or accommodation in these circumstances are now required to enter into such an agreement. The Department questions the need for the amendment given that no specific cases have been identified where unions were previously refused such arrangements and that this issue was not addressed in any way by the Fair Work Act Review 2012.

Costing

The ‘Details-stage Regulation Impact Statement for the Fair Work Act Amendments 2014’ prepared by the Department examined the administrative cost associated with repealing the requirement for employers to provide right of entry transport and accommodation arrangements for remote workplaces. Cost estimates from the Regulation Impact Statement on the Fair Work Act Amendments 2014 have been used as a basis for a revised costing for this PIR. There is limited evidence and data available to estimate the regulatory impact of the amendment so assumptions have been made to estimate the change in compliance costs.
In its submissions 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).

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, it is estimated that 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 around 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. It is assumed that on average three staff would be required to facilitate and recover costs for a right of entry visit to a remote workplace. These costs are further examined below.

**Costing: transport and accommodation arrangements for remote workplaces**

For consistency, regulatory costs have been determined for this provision consistent with the Regulatory Impact Statement prepared for the Fair Work Amendment (Remaining 2014 Measures) Bill 2015.

Regulatory costs can be attributed to either administrative costs associated with facilitating a right of entry visit or the administrative cost for a permit holder to make an application to the FWC in relation to a dispute about accommodation and/or transport arrangements to remote workplaces (s.505 of the Fair Work Act). The FWC can make an order regarding a dispute application, however this is excluded from consideration from the costing methodology as it primarily deals with non-compliance with the regulation and subsequent enforcement.
Visit coordination

Staff would be required to manage logistics for a visit, involving organising accommodation and travel arrangements. This could include liaising with relevant service providers such as travel providers, caterers and accommodation providers, and liaising with the union and union official. The department estimates that for each visit by a union official it would take an employee around 3 hours at the classification of Mining – Environment/Health and Safety ($74.97 per hour) plus an on-cost and overhead multiplier.

Escorting permit holders on-site

A workplace relations representative, work health and safety officer or equivalent staff member may 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 an employee at the classification of Human Resources and Recruitment – Management ($86.45 per hour) plus an on-cost and overhead multiplier.

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 an employee at the Accounting – Financial Accounting classification ($47.10 per hour) plus an on-cost and overhead multiplier. 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.

Number of Remote Workplaces and visits

It is estimated that each of the 167 remote worksites (120 offshore facilities and 47 mining or mining construction sites) would experience an average of two union visits per year.

Making an application

An applicant can apply to the FWC about a dispute concerning access to transport and/or accommodation required to access remote worksites. To make an application an employer has to submit a FWC form ‘F12’ and note they are making an application about a dispute about access to remote workplace.

The current application fee of $68.80 is not incorporated as administration charges are excluded under the costing framework.

Number of applications

No applications have been made to the FWC in relation to a dispute about accommodation and/or transport arrangements to remote workplaces. The lack of applications is indicative of the narrow scope of the amendment and the fact that employers may be compelled to reach transport and/or accommodation arrangements under the amendments if they do not otherwise agree.

Orders

No orders have been made regarding the provisions.
Financial cost

The amendment limits the amount that an occupier can charge a permit holder for transport and/or accommodation arrangements to cost recovery only. Permit holders have to pay for transport and accommodation to access all worksites including worksites that are considered remote. This is considered as business-as-usual and therefore is not included as a change in compliance cost.

Total estimated regulatory cost across the economy

The total annual regulatory cost is estimated at $577,000 across the Australian economy.

i. How did the amendment to transport and accommodation arrangements for remote workplaces affect employers?

A relatively small number of employers who operate at remote locations have been affected by the amendment. The amendment only affects employers where an agreement regarding transport and accommodation would not have occurred previously through negotiation and agreement with the permit holder. For these employers there has been an increase in regulatory compliance costs. Employers are only able to charge permit holders for cost recovery of transport and/or accommodation provided and cannot charge for ancillary costs. Ancillary costs and any costs associated with facilitating a right of entry visit to a remote location are included as a red tape cost.

ii. How did the amendment to transport and accommodation arrangements for remote workplaces affect employees?

In the limited situations that the amendment would apply, union members and eligible employees may have improved access to unions in their remote workplaces for discussion purposes.

iii. How did the amendment to transport and accommodation arrangements for remote workplaces affect employee representatives?

The amendment ensures permit holders can access remote workplaces for right of entry purposes where they previously may not have been able to reach an agreement for transport and/or accommodation with the employer. The permit holder is required to pay the financial cost for the employer provided transport and accommodation. The amendment ensures that the permit holder is not charged additional fees or ancillary costs for the provision of these services. Previously, a fee or surcharge may have been perceived as a barrier to access.

Frequency of entry disputes

Since 1 January 2014, the 2013 Amendment Act has provided the FWC with a new power to resolve disputes about frequency of right of entry visits. In order to exercise the powers the FWC must be satisfied that the frequency of visits would require an unreasonable diversion of the employer’s ‘critical resources’. Evidence presented to the 2012 Fair Work Act Review Panel indicated that frequency of visit problems are largely confined to employers on major projects (page 193).

A consistent view of employer groups is that the FWC has inadequate powers under the Fair Work Act to properly deal with disputes about excessive right of entry visits. In its submission to this PIR, the Australian Industry Group noted its support of the Productivity Commission draft
recommendation (recommendation 19.7). The Productivity Commission recommended amending s.505A of the Fair Work Act for when the FWC can make an order to deal with a dispute about the frequency of entry by an employee representative. The recommendation would repeal the existing requirements under s.505A and instead require the FWC to take into account the combined impact on an employer’s operations of entries, the likely benefit to employees of further entries and the employee representative’s reason(s) for the frequency of entries. The Productivity Commission included the same recommendation in the final inquiry report into the Workplace Relations Framework under recommendation 28.1. The Australian Industry Group stated that:

‘The statutory test in s.505A(4) requiring the employer to explain how the frequency of visits of the permit holder would be an unreasonable diversion of the occupier’s critical resources places a very onerous evidentiary burden on the employer. The inclusion of the word ‘critical’ imposes a test that is virtually impossible to meet’ (page 8).

In its submission to this PIR, ACCI held a similar view and added commentary on the burden of incremental costs:

‘In practice, this has proved a high bar. Employers are required to demonstrate that each visit is a critical issue requiring an unreasonable diversion of their resources. This test overlooks the possibility that excessive entries may impose large, unwarranted costs on an employer without necessarily diverting ‘critical resources’. Indeed when considering excessive frequency of entries, it would seem more likely that it is the ongoing accrual of the incremental costs of each entry that would be most damaging to employers’ (page 17).

In its draft submission to the Productivity Commission Inquiry into the Workplace Relations Framework, AMMA commented on the extent of excessive right of entry visits:

‘One AMMA member in metalliferous mining has received 140 entry requests on their project to date, 49 in the first two months of 2015, which amounts to around one request a day. On any reasonable reading, this is not an organising strategy or response to employee concerns. It is a deliberate campaign to disrupt the workplace and harass the employer into dealing with the union’. 19

Employer groups generally supported strengthening the current frequency of entry provision and supported the Productivity Commission’s draft recommendation on this issue, which remained substantively unchanged in the final report:

‘The Australian Government should amend s.505A of the Fair Work Act 2009 (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:

• repeal the requirement under s.505A(4) that the frequency of entry would require an unreasonable diversion of the occupier’s critical resources

• require the Fair Work Commission to take into account:

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– the cumulative impact on an employer’s operations of entries onto the premises
– the likely benefit to employees of further entries onto the premises
– the employee representative’s reason(s) for the frequency of entries’.  

In contrast, the ACTU in its submission to this PIR considered that:

‘...the provision is having some welcome yet unexpected impact at the margins in reducing employer objections to entry. A case in point arose in Western Australia where a union was organising a new premises, where the union entered upon the workplace for discussions every day for a month. The employer made an application under section 505A. Whilst the employer was dissatisfied with the workplace being organised, the only actual inconvenience it could identify was the necessity of signing the union rep in and making a telephone call to management. The matter was withdrawn by the employer’ (page 2).

It is noted that the Government introduced the *Fair Work Amendment (Remaining 2014 Measures)* Bill 2015 to reduce the threshold that must be met before the FWC can make an order in relation to a frequency dispute. The Bill would remove the ‘critical resources’ requirement, while retaining the orders the FWC can make to resolve a dispute. The changes would also require the FWC to take into account the cumulative impact of entries by all union visits to a workplace and would retain the requirement that the FWC must have regard to fairness between the parties to the dispute. The *Fair Work Amendment (Remaining 2014 Measures)* Bill 2015 lapsed at prorogation on 15 April 2016.

As noted previously, frequency of visit problems are largely confined to employers on major projects. Based on the available evidence the department’s view is that such employers are unlikely to be able to meet the ‘critical resources’ test except in very rare circumstances. This is because 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 considered a critical resource for the purposes of s.505A of the *Fair Work Act*. The department’s view is informed by data showing that only 14 applications and no orders have been made since the provisions came into effect and the submissions of stakeholders (see for example quotes above from the ACCI’s submission).

In summary, the small number of applications and lack of orders made, and the fact that some employers are continuing to experience large numbers of right of entry visits for discussion purposes, indicates that the frequency of disputes amendment has not provided an effective avenue for employers and occupiers to deal with excessive right of entry visits. Submissions to the Productivity Commission Inquiry into the Workplace Relations Framework indicate that right of entry frequency problems continue.

**Costing: frequency of entry disputes**

Any regulatory cost to the FWC in having to deal with applications and deliver orders under s.505A of the *Fair Work Act* is excluded as it is considered government-to-government regulation under the RBM framework.

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Making an application

To lodge an application the applicant has to submit FWC form ‘F12’ and note the dispute is about frequency of entry to hold discussions under s.505A of the Fair Work Act. The FWC can deal with the dispute by arbitration, including making one or more orders, including imposing conditions on an entry permit, suspending an entry permit, revoking an entry permit, orders about the future issue of entry permits or any other order the FWC considers appropriate.

The current application fee of $68.80 is not incorporated as administration charges are excluded from costing under the RBM framework. The fee can be waived in cases of serious financial hardship.

The department assumes that an average business would take 3 hours to complete and submit the application form. This time would also include any additional time required to interact further with the FWC to clarify aspects of the application, if required. The department has assumed a manager or equivalent would complete the application and would be paid $46.10 per hour\(^{21}\). Cost calculations include the default OBPR multiplier which accounts for non-wage labour on-costs.

Number of applications

The FWC has received 14 applications for a frequency of entry dispute under s.505A of the Fair Work Act since 1 January 2014. Therefore, on average there have been seven applications per year. The small number of applications reflects the narrow scope of the provision, the high threshold for an order to be made by the FWC and the discouraging effect this may have on further applications.

Orders

Orders imposed by the FWC on permit holders (suspending, revoking or imposing conditions) are excluded from regulatory consideration as these costs are primarily associated with non-compliance with the regulation and subsequent enforcement.

If an order is made the FWC must find that there has been an ‘unreasonable diversion of the occupier’s critical resources’ due to the frequency of visits. Right of entry visits generally impose a burden on employers, as employers need to facilitate the visit, which would involve a staff member’s time to escort the permit holder while on the premises. Therefore, if the FWC makes an order that reduces excessive right of entry to a non-compliant permit holder there would be regulatory savings to the employer, in terms of facilitation costs.

No orders have been made to date that restrict right of entry to permit holders, therefore there has been no change in compliance costs in this regard.

Total estimated regulatory cost across the economy

The total annual regulatory cost is estimated at $2,000 across the Australian economy, noting that the cost of FWC administering the provisions is not counted for the purposes of this PIR.

\(^{21}\) ABS (Cat. No. 6306.0) Employee Earnings and Hours, 2014. Table 2: Full-Time Non-Managerial Employees Paid At The Adult Rate, average weekly total cash earnings, Average weekly total hours paid for, average hourly total cash earnings-method of setting pay, occupation.
The regulatory cost estimate may reflect that in practice the test required by the FWC to make an order is difficult to meet. The low number of applications likely reflects that employers are not willing to make applications, as there is awareness that the critical resource test is a very high threshold.

i. **How did the frequency of entry disputes amendment affect employers?**
The amendment provided a specific mechanism for the FWC to deal with disputes about excessive right of entry for discussion purposes. Orders can only be made where the Commission is satisfied that the frequency requires an unreasonable diversion of the employer’s critical resources. In this regard, the amendment has set a high bar for employers to prove that the frequency of entry is unreasonable. No orders have been made to date that restrict the right of entry for permit holders since the amendment was introduced on 1 January 2014. The amendment has therefore had no impact on employers, as it has not yet reduced any incidence of what employers regard as excessive entry for discussion purposes.

ii. **How did frequency of entry disputes amendment affect employees?**
The department does not consider that the amendment has had a significant effect on employees as no orders have been made under s.505A to restrict a permit holder’s entry rights, and therefore to reduce employee access to permit holders in the workplace.

iii. **How did frequency of entry disputes amendment affect employee representatives?**
The amendment has had no impact on employee representatives as no orders have been made under s.505A to restrict a permit holder’s entry rights.

**Location of discussions**
The 2013 Amendment Act provides that the regular employee lunch or break room/area is the default location for right of entry discussions if the permit holder and employer cannot agree on a suitable room or area for the discussions. In general, employer groups submitted that there was no evidence that suggested it was necessary to change rules around location of discussion and support repealing the amendment. In its submission to this PIR, AMMA stated that:

‘The case law is still playing out in this area in terms of how it is to be decided exactly which lunch room unions have access to and exactly what constitutes a failure of an employer and union to agree on a location in the first instance...allowing the employer to designate a reasonable location would be a return to a system that incurred fewer disputes and entailed less uncertainty, but importantly had an avenue for a union that felt aggrieved or unduly restricted in meeting with employees to seek redress through the FWC’ (page 6).

In its submission to this PIR, the NFF commented that:

‘Unions can insist on holding meetings in the lunch room by simply withholding agreement from the employer about other places to meet employees. This is an unreasonable and disruptive intrusion into the workplace...’ (page 3).

AMMA held a similar view in its submission that some permit holders are not trying to reach agreement about a suitable discussion location:
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“[permit holders] are going straight onto resource industry worksites and saying ‘we’ve got a legislated right to use the lunchroom and we will not even entertain a discussion with you about an alternative location’, even though that alternative may be even more fit for purpose and appropriate, and provide access to greater numbers of employees and potential union members” (page 7).

The department notes that a decision of the FWC has provided some clarity in relation to location of discussions22. The decision emphasises the need for both the employer and permit holder to make a ‘genuine effort’ to reach agreement as to the location for those discussions before the permit holder can exercise a right to use the lunchroom on the basis that the parties ‘cannot agree’. The decision notes that:

‘s. 492 does not operate so as to lock in a default venue in perpetuity. The occasion for seeking an agreement about a location to hold discussions arises on each occasion that a permit holder enters under s. 484. That on one occasion the permit holder and an occupier cannot reach agreement, does not mean that on the next occasion the permit holder is entitled to proceed to a meal room as the default position. It must first be established that on that occasion the permit holder and the occupier cannot agree on the room or venue of the premises in which on that occasion the permit holder is to hold discussions’.

Permit holders are required to comply with statutory obligations when exercising right of entry, including among other things ensuring they only engage in discussions with employees who wish to participate and who are eligible to be members of the permit holder’s union. Holding discussions with eligible workers can be problematic, as identified in some submissions.

In its submission, Master Builders Australia commented that it had:

‘...received complaints from employees of members who, whilst trying to have meal breaks, have found themselves in the middle of union meetings. These employees have alerted Master Builders that after raising an objection to the meeting being held in the meal room, they were verbally abused by union organisers who claimed that it was their right to conduct the meeting without union members being present’ (page 4).

The ACTU expressed an opposing view in its submission, stating that:

‘On occasions where the official encounters workers who do not wish to speak with him, he simply moves on and talks to somebody else’ (page 3).

Other comments from employer groups noted that there was no evidence that suggested the need to depart from the pre-existing rules regarding interviews and discussions. In its submission, CCIWA stated that:

‘These provisions were considered by the Expert Panel in response to claims by a number of unions that these requirements significantly hindered the exercise of this right. In considering

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these claims, the Expert Panel did not accept arguments that the lunchroom should be the default location for discussions. They instead recommended that s. 492 and s. 505 be amended to provide [the FWC] with greater power to resolve disputes about the location for interviews and discussions...’ (page 10).

In its draft submission to the Productivity Commission Inquiry into the Workplace Relations Framework, AMMA stated that there has been an overall increase in right of entry, although did not provide specific data to support this view:

‘Due to the significant changes to union access laws on 1 July 2009, and again on 1 January 2014, employers are now faced with greater costs and more frequent disruptions to their businesses than before, with less control over visits and fewer consequences being applied to inappropriate behaviour by permit holders’.23

In its submission to this PIR, the ACTU reported a positive experience with the amendment, arguing it had facilitated access to more appropriate meeting locations:

‘The management of some workplaces have often nominated a room for union meetings that requires workers to go to an area of the workplace that they would not ordinarily frequent during lunch breaks and which is frequented by management, with the result that workers who would wish to attend those meetings would be conspicuous in their attendance. Our affiliate[s] reports that, in those circumstances, the usual situation is that no employee attends. Now, the experience is that the union official is able to have discussions with workers and workers do wish to participate in them’ (page 3).

Some employer groups consider that permit holders are abusing their location provisions. The NFF indicated some employers had experienced situations where union representatives used unfair bullying tactics and demanded the use of a particular room. Work health and safety concerns were raised by the employer regarding access to certain rooms.

AMMA submitted that permit holders seek access to different lunchrooms depending on the intended purpose of their visit:

‘...if they are embarking on a recruitment campaign they will want access to the greatest number of employees that are not their members... If they are there for bargaining purposes, they tend to want greater access to their existing members and will choose a location accordingly. If the entry is part of a more general campaign to cause workplace friction, they will choose the location that is the least convenient to the employer / occupier and most problematic and undesirable operationally’ (page 7).

The department notes that the Government had introduced the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 to restore the arrangements in place prior to 1 January 2014 in relation to location of discussions. This Bill lapsed at prorogation on 15 April 2016. The provisions would have

provided that a permit holder must comply with any reasonable request by the occupier to hold discussions in a particular room or area of the premises and sets out a non-exhaustive list of circumstances where a request might be considered unreasonable, including if it is made with the intention of intimidating or discouraging persons from participating in discussions, or if the room is not fit for purpose. The intention of the amendments is to ensure that workers who wish to speak with a union may do so in an appropriate location while allowing other workers the capacity to avoid such discussions if that is their preference.

The department notes that the Final Report of the Productivity Commission Inquiry into the Workplace Relations Framework considers that a default location for discussions was not desirable. The Productivity Commission observed that the:

‘primary drawback of prescriptively enshrining a default location (that is, meal break rooms) in statute, as the current arrangements do, is that it will usually require sacrificing some degree of flexibility should a dispute about location arise...A recurring theme in this report has been that the FW Act should focus on the substance of a matter, rather than adherence to prescriptive requirements. The recent amendments [under the Fair Work Amendment Act 2013] appear to be contrary to this principle, and prima facie the Productivity Commission sees merit in a return to a more flexible, principles-based approach to regulating disputes about discussion locations’ (p.914, Productivity Commission final report).

In a recent decision on location of discussions, a FWC Full Bench has permitted the CFMEU to hold discussions in dragline crib rooms at a BHP Billiton Mitsubishi Alliance coal mine, overruling a previous decision that the areas were not fit for purpose24. Draglines are very substantial pieces of mining equipment used to remove waste material from coal in open cut mining. The draglines in question contain an operators’ cabin (approximately 2.0 metres by 2.0 metres), behind which is a multi-functional work area (4.4 metres by 1.03 metres) that contains two benches on either side. One side of the area is a work station that has a computer, one or two chairs and other work related material. On the other side of the area is a ‘half kitchenette’ with facilities that could be used for storing and preparing meals. There is no table provided.

The original decision25 found that the room behind the dragline operators’ cabins were ‘primarily functional work areas’, rather than rooms or areas within the meaning of s. 492(3). Despite the CFMEU’s argument that it was common practice for employees to take meals and breaks in these rooms, the FWC Deputy President agreed with the company that this was not the ‘primary purpose’ and ‘logistical’ difficulties rendered the areas unsuitable for conducting union discussions.

In the appeal, the FWC Full Bench found that despite the area having multiple purposes, it satisfied the description in the subsection because it was provided by the employer in part for meal and other breaks:

‘We do not consider that the use of the area for multiple purposes deprives it of the description in paragraph (b) [of s.492 (3)]. The words of the paragraph do not require a sole

purpose or a sole use and there would be few areas of any workplace that could fit such a description. To read such a concept into paragraph (b) would be to offend the principles of statutory interpretation...’.

The Full Bench further found that:

‘...the application of the section does not require consideration of the appropriateness of the breadth of the right of entry or other practical implications. The right of entry provisions operate on their face and in conjunction with the various other limitations...’.

A BHP spokesman was quoted in the press in relation to the decision, stating that ‘this decision would unnecessarily reduce the productivity and economics of our operations as it disrupts the operations of our draglines, which at 2500 tonnes are the largest, most expensive equipment we have in our operations’.

While noting in some cases employee representatives now have greater access to more meeting locations, the department considers that there was a suitable dispute mechanism available under the previous system if a right of entry permit holder was of the view that the meeting location was not appropriate. The department also notes that, where agreement is not reached on a location and the meal or break room is defaulted to, the current provisions do not require consideration of the practical implications of this. All employers considered that the previous provisions were adequate and that the new provision is disruptive to employees in the lunchroom who do not want to participate in right of entry discussions.

### Costing: location of discussions

Regulatory compliance costs from this amendment relate to making an application to the FWC to seek resolution regarding a right of entry location of discussion dispute. A number of other aspects that were identified in stakeholder submissions, such as the value of an uninterrupted meal have also been examined below. However, these aspects are not considered as regulatory costs under the RBM framework and therefore are excluded from costing.

#### Making an application

An applicant can apply to the FWC about a right of entry dispute. To lodge an application the applicant has to submit FWC form ‘F12’ and note the dispute is about location of discussions.

The current application fee of $68.80 is excluded from consideration as administration charges are excluded from costing under the RBM framework. The fee can be waived in cases of serious financial hardship.

The department assumes that a normally efficient business would take 3 hours to complete and submit the application form. This time would also include any additional time required to interact further with the FWC to clarify aspects of the application, if required. The department has assumed a

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manager or equivalent would complete the application and would be paid $46.10 per hour\textsuperscript{27}. Cost calculations include the default OBPR multiplier which accounts for non-wage labour on-costs.

**Number of applications**

Fifty-four applications have been made under s.505 and s.508 of the Fair Work Act regarding location of discussion disputes since 1 January 2014.\textsuperscript{28} This equates to an average of 27 applications per year.

**Orders**

The FWC has made three orders under s.505 relating to location of discussion disputes since 1 January 2014. This is not included in regulatory costings as it deals with enforcement of non-compliance with the regulation.

No orders have been made by the FWC under s.508 of the Fair Work Act regarding disputes about the location of discussions or interviews.

**Indirect costs**

Some submissions indicated that establishing lunch rooms as the default meeting place for union right of entry discussions interferes with the right of workers to relax and enjoy their meal breaks without being forced to listen to union officials if they remain in the room. Some individuals may place a significant value on uninterrupted breaks; however, indirect costs are excluded from consideration under OBPR’s RBM framework. This includes costs that may arise indirectly from the impacts of a regulatory change.

**Total estimated regulatory cost across the economy**

The total annual regulatory cost is estimated at $6,000 across the Australian economy, noting that the cost of FWC administering the provisions is not counted for the purposes of this PIR.

\textit{i. How did the location of discussions amendment affect employers?}

Employers are generally of the view that the amendment has increased disputes about the locations of discussions and that providing access to lunchrooms for discussions is disruptive to their workforce. Under the previous provisions, there would have also been disputes about the suitability of locations; however, under the previous provisions, the application to contest the suitability of the location would have been made by the Union instead of the employer.

\textsuperscript{27} ABS (Cat. No. 6306.0) Employee Earnings and Hours, 2014. Table 2: Full-Time Non-Managerial Employees Paid At The Adult Rate, average weekly total cash earnings, Average weekly total hours paid for, average hourly total cash earnings-method of setting pay, occupation.

\textsuperscript{28} Note: An applicant can apply under s.508 of the Fair Work Act for a dispute in relation to s.492 (location of discussions). There have been 53 applications made to the FWC under s.505 that have referenced s.492 – it is understood that these cases have proceeded as if the applications were made under s.508.
In addition, some submissions stated that lunchroom union meetings or discussions are disruptive and costly to their workforce; however, evidence was not provided about the extent and nature of these disruptions. Furthermore, the impact of any disruptions is unlikely to be consistent across workplaces and would be problematic to measure. Given this, these impacts cannot be costed.

The recent decision of the FWC Full Bench in *BHP Billiton Mitsubishi Alliance* also highlights that the application of the section does not require consideration of practical implications of the default location, a decision which the employer argues will have a negative impact on productivity.

**ii. How did the location of discussions amendment affect employees?**
Evidence provided by employer groups in submissions indicated that some employees that are not union members perceive that the amendment has affected their enjoyment of meal and lunch breaks. This perceived cost is not considered in terms of regulatory burden. For other workers the change may have made it easier for them to speak to union officials in the workplace by providing a more convenient location for discussions to occur.

**iii. How did the location of discussions amendment affect employee representatives?**
In some cases, employee representatives now have access to meeting locations that are more acceptable to them. It is noted that prior to the locations for discussions or interviews amendment a permit holder was able to apply to the FWC for orders if they believed that the location provided by the employer was not acceptable for a range of reasons and to prevent an employer abusing the provisions.

**General protections and unlawful termination**

**Consent arbitration**
There were mixed views in relation to this amendment in submissions to the PIR. For example, the National Retail Association did not consider there to be much practical utility in empowering the FWC to arbitrate general protections dismissal and unlawful termination disputes by consent and supports repealing the provision.

An alternate view from AMMA was that:

‘*There have been very few arbitrated outcomes under those provisions to date. AMMA and its members were not strongly opposed to those provisions when the Fair Work Amendment Act 2013 went before parliament given that applications can only be heard with the consent of both parties, and it may in some cases be less expensive to have matters arbitrated by the FWC than the courts*’ (page 23).

In its submission, ACCI recommended that:

‘*The General Protections provisions should be repealed and the pre-Fair Work Act 2009 provisions for freedom of association and unlawful termination reinstated. Pending this, the provisions introduced by Schedule 4A of the Fair Work Amendment Act 2013 (Cth) should continue to operate*’ (page 4).
The AiG perceived that consent arbitration of general protections dismissal disputes can create significant risks for employers who may not be aware when agreeing to arbitration of the unlimited compensation that the FWC can award. The AiG supports a six-month cap on compensation as recommended by the Productivity Commission in its draft report (this was not a final recommendation). It is noted that uncapped compensation is available whether a matter is pursued through consent arbitration or through the courts.

The ACTU noted that employers have been reluctant to agree to consent arbitration of these disputes where the applicant is represented by their union. State governments did not provide specific comments on the consent arbitration provision.

The feedback generally received from stakeholders is that this provision provides potential access to a faster, less expensive and less formal alternative to court proceedings. On average, there have been 17 applications per year for consent arbitration. The process for agreeing to arbitration is:

- for the FWC to arbitrate it must first deal with the matter through a non-arbitration method, such as conciliation or mediation
- the FWC can issue a certificate stating that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be unsuccessful
- the parties may then apply for a general protections dismissal dispute or unlawful termination dispute to be arbitrated but only if both parties provide written consent within 14 days of the certificate being issued.

The factors outlined above show that there are a number of steps that need to occur before the FWC can arbitrate a general protections dismissal dispute or unlawful termination dispute, therefore it is reasonable to consider that the provision would not have significant use. For example, a number of applications would be resolved before consent arbitration could occur through a non-arbitration method. Overall, the provision provides potential access to a faster, less expensive and less formal alternative to court proceedings but only where all parties agree. On this basis, the provision appears to be operating as anticipated.

**Costing: Consent arbitration**

The provision primarily relates to events arising from non-compliance with either the general protections dismissal or unlawful termination provisions and subsequent enforcement of non-compliance.

Under the RBM framework, the regulatory impact of court and tribunal administration is excluded from costing. The cost of non-compliance with a regulation, including legal fees and costs incurred in court and tribunal processes are also excluded from consideration. Therefore, consent arbitration applications and orders are excluded for red tape purposes. In addition, any cost to the FWC is not considered in a regulatory costing, as it is government-to-government regulation.

Although it is excluded from regulatory costing, consent arbitration still provides a potentially less expensive avenue for dealing with such disputes. Alternatively, applications could progress to the Federal Court or the Federal Magistrates Court, which is likely to take longer to resolve and involve higher costs for the parties.
Making an application

To make an application to the FWC for consent arbitration of a general protections dismissal dispute, FWC form ‘F8B’ has to be submitted by one of the parties with the other party’s consent. To make an application to the FWC for consent arbitration for unlawful termination, FWC form ‘F9B’ has to be submitted by one of the parties with the other party’s consent.

The current application fee of $68.80 is excluded from consideration as administration charges are excluded from costing under the RBM framework. The fee can be waived in cases of serious financial hardship.

Number of applications

To date very few parties have opted to use the FWC’s consent arbitration process.

There have been 34 applications for consent arbitration for general protection dismissal disputes since 1 January 2014. Therefore, on average there have been 17 applications per year over two years.

There have been no applications for consent arbitration of unlawful termination disputes to date.

The cost of applications has been excluded from the estimate of regulatory compliance costs as the provision primarily relates to events arising from non-compliance and subsequent enforcement activities.

Orders

To date, only four orders have been made which was for the payment of compensation to the person. This is not included in regulatory costings as it deals with enforcement of non-compliance with the regulation.

To date, no other orders have been made by the FWC regarding consent arbitration.

Total estimated regulatory cost across the economy

The total annual regulatory cost is estimated at $0 across the Australian economy.

Time limit for making an unlawful termination application

Stakeholders provided limited feedback on this minor, technical amendment. Stakeholders that provided feedback generally considered that aligning the time limit for making an unlawful termination application with the time limits for general protections and unfair dismissal applications was sensible and justifiable. The department regards the amendment as a minor procedural matter that has added consistency, which is welcomed by stakeholders.

Costing: Time limit for making an unlawful termination application

This minor, technical amendment aligned the time limit for making an unlawful termination application with the time limit of 21 days that applies for making general protections dismissal and
unfair dismissal applications. Previously, unlawful termination applications had a time limit of 60 days.

The amendment constitutes a minor procedural change that has not led to a change in regulatory compliance costs. The application process has not been changed, only the time limits for applying have been altered. Any cost to the FWC is not costed under the RBM framework as it is counted as government-to-government regulation.

**Total regulatory estimated cost**

Total annual regulatory cost is estimated at $0 for the Australian economy.

The regulatory cost estimates for these changes are consistent with stakeholder feedback. No change in regulatory compliance costs was identified from the amendment.

**i. How did the amendments to the general protections and unlawful termination provisions affect employers?**

No regulatory change has been identified from the amendment to consent arbitration. The amendment offers an alternative for employers to settle a general protections dismissal dispute or unlawful termination claim where both parties consent. Consent arbitration provides access to a potentially faster, less expensive and less formal dispute resolution process relative to court proceedings. A small number of cases have proceeded to consent arbitration.

It is considered that aligning the time limit for making an unlawful termination application with unfair dismissal and general protections applications has benefited employers by providing additional consistency in the treatment of dismissal matters.

**ii. How did the amendments to the general protections and unlawful termination provisions affect employees?**

The amendment offers an alternative for employers to settle a general protections dismissal dispute or unfair dismissal claim where both parties consent. Consent arbitration provides potential access to a faster, less expensive and less formal dispute resolution process relative to court proceedings. A small number of cases have proceeded to consent arbitration.

Aligning the time limits for making an unfair termination application with unfair dismissal and general protections applications has reduced the amount of time available for a person to make an application.

**iii. How did the amendments to the general protections and unlawful termination provisions affect employee representatives?**

Employee representatives have the capacity to represent their relevant members in relation to consent arbitration. Limited feedback was received on this aspect apart from the employee representative perception that employers appear reluctant to agree to consent arbitration where the applicant is represented by their union. Presumably, consent arbitration, if agreed, would provide a faster and less costly outcome where unions were involved as well.
It is considered that aligning the time limit for making an unlawful termination application with unfair dismissal and general protections applications may have benefited employee representatives by reducing complexity, although has reduced the time in which they can make an application for a member.
**Total regulatory cost across the economy**

The department notes that the regulatory costing analysis contained in the PIR only provides a general indication of the change in compliance costs from the provisions of the *Fair Work Act Amendment 2013* that came into effect on 1 January 2014. Costings should not be used as a basis for further analysis. As part of the PIR, the department is required to estimate the change in compliance costs throughout the Australian economy where relevant under the RBM framework. The regulatory compliance cost estimates contained in this PIR provide a general indication as to the direction of compliance burden as estimates rely on broad assumptions and limited data.

**TABLE 2: SUMMARY OF AVERAGE ANNUAL ECONOMY-WIDE REGULATORY COST ESTIMATE**

<table>
<thead>
<tr>
<th>Provision</th>
<th>Average annual economy-wide regulatory cost estimate*</th>
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<td>Consultation about changes to regular rosters or working hours</td>
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</tr>
<tr>
<td>Modern awards objective amendment</td>
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<td>Right of entry: transport and accommodation arrangements for remote workplaces</td>
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<tr>
<td>Right of entry: frequency of entry disputes</td>
<td>$2,000</td>
</tr>
<tr>
<td>Right of entry: location of discussions</td>
<td>$6,000</td>
</tr>
<tr>
<td>Consent arbitration</td>
<td>$0</td>
</tr>
<tr>
<td>Aligning the application time limit to 21 days (unlawful termination)</td>
<td>$0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$585,000</strong></td>
</tr>
</tbody>
</table>

*Estimations are rounded by the Commonwealth Regulatory Burden Measure costing calculator.*
5. Conclusion

The department has endeavoured to make an overall assessment as to whether each of the amendments under the Fair Work Amendment Act 2013 remain appropriate and how effective and efficient they have been in meeting their objectives. This assessment is based on evidence provided by stakeholders, quantitative evidence and the conclusions reached by other reviews and expert bodies. The amendments are examined in further detail below and a conclusion as to whether the amendment delivered an overall net benefit drawn for each of them.

Consultation about changes to regular rosters or working hours

Overall, the department considers that this amendment would directly impact a small number of employers and employees. As noted previously, clauses on consultation for major workplace change were already required in enterprise agreements and also generally included in modern awards. In addition, a number of submissions to this PIR noted that modern awards and enterprise agreements already contained provisions regarding rostering of employees and variation of hours. Outside of formal requirements to do so, many employers would already have consulted with their employees as part of good management practice. For these reasons, the department is of the view that the majority of employers would have already engaged in formal or informal consultations for roster changes with their employees prior to the amendment. As such, a normally efficient business has been defined as one that would consult on changes to regular rosters or working hours, regardless of the existence of this particular amendment.

The consultation requirements do not prevent employers from making changes to regular rosters or working hours. Dispute resolution mechanisms within a relevant modern award or enterprise agreement apply to the consultation requirements, meaning that in circumstances where employers fail to comply with their consultation obligations, compliance with the new requirements to consult may ultimately be enforced by application to the FWC.

Under the RBM framework, changes in regulatory cost are only considered over and above what a normally efficient business would pay in the absence of the regulation. In this regard, the amendment has not increased regulatory compliance costs under the RBM framework. Regardless of this exclusion, the department is not aware of any data that could be used to estimate the number of employers and employees that would be directly affected by the amendment.

However, for employees that were not previously consulted, these amendments provide a formal requirement for consultation to occur before their regular roster or working hours can be changed. On this basis, the department considers that the amendment provides a small net benefit (with no change in regulatory cost) to the community in the form of increased protection from changes to employees’ regular roster or working hours without consultation for affected employees.

Modern awards objective

Since the amendment was made to the modern awards objective, the FWC has not increased penalty rates in modern awards or introduced penalty rates into modern awards where they did not
already exist. The department is therefore of the view that the amendment to the modern awards objective has not had an identifiable impact to date. A longer time period may result in a FWC decision that is influenced by the FWC’s consideration for the ‘need’ to provide penalty rates for work that occurs essentially in non-social hours.

With regard to key data supporting this conclusion, it is important to note that there are currently over one hundred awards under review by the FWC as part of the four yearly review process. The amendment has not led to an increase in penalty rates or an introduction of penalty rates in any modern awards where they did not previously exist. The amendment requires the FWC to take into account the need to provide additional remuneration for employees essentially working non-standard and unsocial hours although does not require the FWC to consider a specific level of remuneration. The FWC considers a range of factors when reviewing modern awards and the amendment is but one of a number of factors. The decision to lower Sunday penalty rates for some workers covered under the Restaurant Industry Award 2010 indicates that the amendment cannot be considered a hard barrier to reducing penalty rates in modern awards.

The information available is not conducive to reaching a conclusion on whether the amendment has led to a net benefit and how effective and efficient it has been in achieving its objective. On the balance of the information available to date, the department considers it unclear as to whether the amendment has led to a conclusive net benefit to the community, although it does not appear to have had a detrimental effect on the community.

The department considers that as there has been no additional annual regulatory cost associated with this requirement, the regulation remains appropriate pending the Government’s consideration of the Productivity Commission’s Inquiry into the Workplace Relations Framework. Consideration of the appropriateness of the provisions can then be considered as part of broader changes to the Fair Work Laws that may be contemplated by the Government.

Right of entry

**Transport and accommodation arrangements for remote workplaces**

The ACTU has advised that this amendment has provided a benefit to permit holders that would have previously been unable to reach an agreement on accommodation and transport arrangements to facilitate right of entry to remote worksites. In these limited situations, employees would benefit from improved access to their representatives in the workplace. This benefit is difficult to quantify due to a lack of data about the number of affected employees.

A regulatory compliance cost has been identified, which is imposed on the employer. A number of business stakeholders report that this amendment is impractical, often dangerous, unnecessary, costly and excessively onerous. The cost recovery limitation has reduced an employer’s ability to recover what some stakeholders would consider as the true cost of facilitation. There are therefore additional costs for employers who previously would not have agreed to provide transport and accommodation to such sites.

On the balance of information available, the department considers the amendment is red tape and is not necessary. In conducting this PIR, the department has not been able to identify any specific case
before the amendment took effect where a right of entry permit holder was denied access to employer provided transport and/or accommodation that was required to access a remote worksite.

It is also noted that the amendment was not a recommendation of the previous government’s Fair Work Act Review 2012. On the basis that there was not a strong case for the amendment to be made in the first place and strong evidence has not been presented for its ongoing need, the department endorses the view of employer stakeholders that the provisions should be repealed.

It is noted that the Government introduced the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 to repeal the transport and accommodation provisions introduced by the 2013 Amendment Act. This Bill lapsed at prorogation on 15 April 2016. As noted previously, a Regulation Impact Statement prepared for this legislation found that repealing the measures would involve substantial savings for employers.

**Frequency of entry disputes**

This provision is regarded by employer groups as being ineffective in addressing excessive entry for discussion purposes due to the requirement to demonstrate that the frequency of visits by a permit holder would require a diversion of the occupier’s critical resources before the FWC can make an order. This argument is supported by the fact that there have been very few applications and orders made under the provisions.

The former government’s Fair Work Act Review 2012 recommended that the FWC be given greater powers to resolve frequency disputes ‘in a way that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience’\(^\text{29}\). The department’s view is that the amendment has not achieved this balance given the lack of applications and orders made under the provisions and evidence of ongoing frequency problems presented to the Productivity Commission’s Inquiry into the Workplace Relations Framework. It is noted that the Productivity Commission has recommended an amendment to s.505A of the Fair Work Act to lower the threshold before an order can be made by the Fair Work Commission\(^\text{30}\).

Based on the available data, submissions to this review and conclusions by the Productivity Commission, the department’s overall view is that the amendment has not achieved its aim of providing the FWC capacity to effectively deal with right of entry frequency disputes.

The department therefore considers that the amendment is red tape, has not led to an overall net benefit and the regulation is not appropriate. It is noted that the Government introduced the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 to lower the threshold that must be met before the FWC can make an order in relation to a frequency dispute. This Bill lapsed at prorogation on 15 April 2016.

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Location of discussions

Based on the evidence presented to this review, the department’s view is that the change to the location provisions made by the 2013 Amendment Act was not justified. This view is supported by the findings of the Fair Work Act Review 2012, which recommended increasing the powers of the FWC to deal with location disputes, rather than to implement the wholesale change to the provisions made by the 2013 Amendment Act. The department’s view is also supported by the Productivity Commission’s Inquiry into the Workplace Relations Framework which was critical of the change, highlighting the prescriptive nature of the provisions and the lack of flexibility in the case of a dispute.

The change reduced the capacity for employers to specify an appropriate room for discussions and interviews, other than the lunch or break room. While noting union concerns that the previous provisions led to inappropriate locations being nominated in some instances, the department notes that permit holders could and did make applications to the FWC if they did not consider the location to be fit for purpose or was selected to deter employees from attending meetings. Conversely, a recent decision of the FWC Full Bench highlighted that the application of the section does not require consideration of practical implications of the default location of discussions. The department considers that the previous location provisions provided an appropriate balance between the needs of employers, employees and permit holders.

Evidence presented by employer stakeholders indicates that the current rules encourage access to the default location for discussions and interviews, rather than the employer and permit holder genuinely agreeing to a suitable alternative location. While there have been few dispute applications to the FWC in relation to the provisions, the department considers that this is more likely due to employers interpreting the legislation as rigidly defining a default location, rather than evidence of amicable arrangements being agreed between the parties. The department also notes evidence that the current rules can be disruptive to employees’ work breaks, with employees either unable to avoid discussions with permit holders or having to vacate break rooms in order to do so.

Based on stakeholder evidence and the conclusions drawn by other expert bodies, the department’s view is that the amendment has not led to a net benefit to the community and the regulation is not appropriate or necessary. The evidence indicates that the provision has increased disputation between employers and permit holders about the location of discussions and interviews and is unnecessarily disruptive for employees not interested in participating in meetings with unions.

The Government introduced the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 that would reinstate the location of discussion rules in place before the 2013 Amendment Act took effect. This Bill has lapsed at prorogation on 15 April 2016.

General protections and unlawful termination

Consent arbitration for general protections and unlawful termination

While the nature of information available for this PIR makes it difficult to reach a conclusion, the department considers that consent arbitration provides a potentially faster, less expensive and less formal dispute resolution process compared to court proceedings. The amendment has not increased regulatory compliance costs for parties involved and stakeholders have generally responded positively to the change. Although the provisions have not been widely used, they have
provided a lower cost avenue for some parties to settle a general protections dismissal or unlawful termination claim.

Based on evidence provided to the PIR, the department considers that the amendment provides a small net benefit to the community (with no change to regulatory cost).

**Time limit for making an unlawful termination application**

Aligning the time limit for making an unlawful termination application is a minor and technical amendment that has no impact on regulatory compliance costs. Stakeholders that provided feedback generally considered that aligning the time limit for making an unlawful termination application with the time limits for general protections and unfair dismissal applications was sensible and justifiable.

Based on the qualitative stakeholder feedback provided to this PIR, the department considers that providing consistency across dismissal related disputes has reduced complexity and provides an overall net benefit (with no change to regulatory cost).