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Tuesday, November 13, 2012

Dear Secretary

Fair Work (Amendment) Bill 2012

The ACTU welcomes the opportunity to make a submission in relation to the above Bill ("the Bill"). The Bill represents a balanced package of largely technical and administrative amendments which we support. We would urge the prompt enactment of the Bill, noting its widespread support and the thorough consultation process that preceded it. Accordingly, the ACTU suggests that its passage be recommended to the Senate.

The Bill was proposed following consultation by the Minister for Workplace relations with the ACTU and Employer representatives. It is focused toward a number of specific recommendations in the report of the panel that conducted the post implementation review of the Fair Work Act ("the Panel"), as well as additional matters that arose during consultations with the President of Fair Work Australia and in the report of the Productivity Commission into Award Default Superannuation.

The ACTU made two written submissions to the Panel and met with it twice during its consultation process. Following the release of the Panel's report we met with the Australian Industry Group to explore areas where we could agree to support the implementation of specific recommendations in the Panel's report, and many of these agreed positions are reflected in the terms of the Bill. The ACTU also made submissions to the Productivity Commission in the consultations leading to its report referred to above. In addition, we are represented on the National Workplace Relations Consultative Committee and the Committee on Industrial Legislation (along with peak employer bodies) and thus were consulted on the terms of the Bill prior to its introduction.

The tri-partite consultative process adopted by the Minister has greatly assisted the ACTU and other parties in considering these matters. We also express our thanks to the staff of the Department of Education, Employment and Workplace Relations for providing for their assistance during the COIL process.

SECURE JOBS BETTER FUTURE

A summary of the changes introduced by the Bill and our brief commentary in relation thereto is set out below.

In response to the Fair Work Act Review:

Registered Organisations will be given standing to apply to vary awards to remove ambiguity or uncertainty or correct error. Most applications to vary an award are processed under sections 157-158. These sections provide standing to make the application to either an employer, employee or organisation that is covered by the award, as well as an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the award. Sections 157-158 hence provide standing to employer organisations and unions that are not covered by the award, provided that they represent employers or employees who are so covered. Section 160, which deals with the power to amend to remove ambiguity or uncertainty or to correct error, provides standing to employer and employee organisations only if they are directly covered by the modern award. It does not provide standing to employers or employees either, yet the tribunual may exercise the power on its own motion. During the award modernisation process, the Australian Industrial Relations Commission decided ([2008] AIRCFB 1000) that it would not name organisations in modern awards, with the result that there are no organisations covered by any modern awards. Accordingly, the power to vary an award to remove ambiguity or uncertainty or correct error has only truly been excercisable on the Tribunal's own motion. This technical amendment addresses that anomaly.

An applicant for a scope order will be required to take all reasonable steps to give notice to all other bargaining representatives. Currently the Fair Work Act requires a putative applicant for a scope order to give a notice of its concerns regarding the scope of the proposed agreement to all relevant bargaining representatives, and allow a reasonable time for a response, before proceeding with their application. The difficulty with the existing requirement is the putative applicant may not be aware of who all the relevant bargaining representatives are, or how to contact them – only the employer will be ceased of that information. This amendment will assist to overcome that practical difficulty. For example, if the putative applicant makes reasonable enquires of the employer to ascertain the identity of the other bargaining representatives and circulates its notice accordingly, it ought to be said to have taken "reasonable steps". Whilst we believe that ideally the employer should be obliged to inform all bargaining representatives of the identity of all other bargaining representatives and how to contact them, the amendment is welcome improvement.

Notices of representational rights to be confined to the information provided in the legislation and the regulations. Notices of Representational Rights are required to be issued to employees no later than 14 days after the notification time for a proposed enterprise agreement. In most instances, the notification time is the time at which the employer initiates bargaining, or agrees to bargain, or is compelled to do so by force of a majority support determination. Absent a requirement to issue such notices, employees could be unaware that collective bargaining is occurring at their workplace and of their rights to participate or be represented in it. They are therefore important instruments to facilitate and encourage participation bargaining. Our affiliates have experiences of Notices of Representational Rights being supplemented in a manner which could lead to employees believing that they must make a positive nomination of a bargaining representative (such as another person at the workplace), in order to have their views represented in the bargaining process. This amendment addresses this practice.

Union officials not to act as bargaining representatives for workers that the official's union is not eligible to represent. Presently the Act prevents (at section 176(3)) a union from acting as a bargaining representative for an employee unless the union is entitled to represent the industrial interests of the employee concerned. This leaves open the possibility that an officer of a union may, in a personal capacity, seek to represent such employees - within the requirement contained in the Regulations that he or she remains free from the control of the union of which he or she is an official. Although there are less than a handful of examples that the ACTU is aware of this practice occurring, we agree that it is inappropriate for a union official to devote their time as an elected official, and their members' resources, toward representing persons that the union's rules do not permit the union to represent. Unions must be democratically controlled by their members.

Capacity for Protected Action Ballots to be conducted electronically. Although there is no specific prohibition in the Act on electronic voting, the definition of "ballot paper" and the context in which it appears does not sit comfortably with the concept of electronic voting. Although the Australian Electoral Commission is not mandated as the ballot agent by the Act, in practice it is a default rarely departed from. Our affiliates' experience is that the Australian Electoral Commission has an administrative preference for conducting ballots via post in circumstances where it only other option is attend workplaces to conduct a paper ballot. The lack of flexibility results in delays and low returns. This amendment should permit more timely and efficient balloting to occur, particularly of employees in remote workplaces or dispersed enterprises. We would be pleased to participate in consultations with the Tribunal and the Australian Electoral Commission concerning its implementation.

Employees who join a union that has secured a Protected Action Ballot after that order has been granted to be permitted to vote on and take protected action. The legislation currently limits the voting cohort to persons who meet the group description contained in the ballot order as at the date the order is made. It may be the case that employees who may otherwise identify with union collective bargaining are not motivated to join the union and be represented by it bargaining unless or until a ballot order is secured, as the ballot order is perceived as some as giving legitimacy to the union's organising efforts. At present, these person's views will not be represented in the ballot process. This technical amendment addresses this problem.

Requirements that protected action ballot agents conduct ballots expeditiously. Our affiliates have reported that the timetable for protected action ballots is formulaic and inflexible, resulting in unwarranted delays in many instances. This amendment will assist to address this concern. We would be pleased to participate in consultations with the Tribunal and the Australian Electoral Commission concerning the implementation of this amendment.

Employee bargaining representatives that are members of a union that is seeking a Protected Action Ballot order to be permitted to vote on and take protected action under that ballot order. Any employee, including a union member, is entitled to put themselves forward as bargaining representative. The current provisions would prohibit an employee bargaining representative who is a union member from participating in a protected action ballot, unless he or she elects to be a jointly named applicant for the order or ceases to act as a bargaining representative. The amendment addresses this problem.

Agreement clauses that permit "opting out" to be unlawful terms. There have been different views expressed within Fair Work Australia as to whether agreements containing such clauses are capable of being approved. Such clauses can undermine the collective nature of agreement making, including by facilitating approval votes from persons who do not intend to remain covered by the agreement. This amendment resolves the legal ambiguity in a manner which is consistent with the underlying policy of genuine good faith collective bargaining.

Prohibit the making of an enterprise agreement with one employee. There have been different views expressed within Fair Work Australia as to whether agreements which are made with only one person are capable of being approved. The practical reality is that such agreements serve to artificially "lock down" the terms and conditions in an enterprise before a sufficient workforce has been engaged to genuinely participate in good faith bargaining. Single employee agreements would therefore be attractive to newer businesses seeking to satisfy the limited "market rate" conditions associated with sponsoring guest workers. This amendment resolves the legal dispute in a manner which is consistent with the underlying policy of genuine good faith collective bargaining.

21 day time limit to lodge Unfair Dismissal applications and General Protections applications that relate to dismissal. We believe that 21 days is an appropriate period to enable employees to seek advice on potential unfair dismissal applications. We accept that an alignment of the time limits for termination of employment matters in the context of the package of amendments as a whole.

Fair Work Australia to have the power to dismiss unfair dismissal applications where the applicant unreasonably fails to attend or comply with orders/directions or discontinue a matter after a settlement agreement has been concluded. Because this amendment operates in conjunction with section 397 of the Act and the power is discretionary, it is hoped that it will not be unduly onerous on unrepresented parties. Whilst we have difficulty in the abstract accepting an amendment that establishes a higher standard of conduct on dismissed workers participating in the industrial relations system than anyone else, we acknowledge as is put in the explanatory memorandum that the amendment is narrowly focused and "intended to address the small proportion of applicants who may pursue claims in an improper or unreasonable manner". We will monitor the operation of this provision to ensure it does not have any unintended consequences.

Costs orders to be available (including against lawyers and paid agents who have not yet been granted permission to appear) where a party has unreasonably failed to discontinue, unreasonably failed to agree to a settlement agreement or has unreasonable caused the other party to incur costs. These provisions will apply equally to employers and employees. We agree with the Panel that power to award costs should not depend on the formal grant of representational rights. Again, these provisions are targeted toward the small number of exceptional cases where practices have been unreasonable. We will monitor the operation of these provisions to ensure they do not have any unintended consequences.

Concerning Fair Work Australia:

Fair Work Australia to be renamed the "Fair Work Commission". The description of the Tribunal as a Commission makes its role as an adjudicative tribunal clearer to users of the system, and restores a name with considerable community resonance and understanding .

Minimum Wage experts (3) and Default Superannuation experts (3-) to be referred to as "Expert Panel Members". These administrative amendments support the introduction of the default superannuation award review.

The Governor General's appointment of a General Manager to follow nomination by the President of Fair Work Australia. We note that these provisions introduce consistency with manner of appointment of the Registrar of the Federal Court of Australia. Further, as the President of the Fair Work Commission will invariably be a person with extensive experience and expertise in workplace relations, his or her involvement in the appointment process for the General Manager is warranted.

A Presidential member to be empowered to stay a decision under appeal, irrespective of whether that member will be on the bench considering that appeal. This provision will provide greater flexibility and administrative efficiency in its programming.

Power to appoint Acting Commissioners. A similar power already exists in relation to Acting Deputy Presidents and it will enable the tribunal to be more responsive during unanticipated peaks in demand or unavailability of its members.

Power to appoint two full-time Vice Presidents. The Australian Industrial Relations Commission previously had Vice Presidents, however the statutory office of Vice President of Fair Work Australia was omitted from the Fair Work Act.

In response to the Productivity Commission Review of Award Default Superannuation:

Power to appoint three Expert Panel Members with knowledge or experience in Superannuation, investment management or finance to sit with four FWC members during 4 yearly reviews of default fund terms in modern awards.
The new default fund selection process will require the Commission to consider a range of complex superannuation-related matters such as investment returns, risk profiles and product cost-structures when deciding which MySuper products are listed. It is therefore appropriate that the Commission have access to appropriate expertise in superannuation or related areas. This provision will ensure that such expertise is available.

Two stage process for default fund reviews: A shortlist of compliant MySuper products chosen on performance and administration criteria followed by a section of shortlisted funds that are appropriate for each award. This approach recognises that because of the highly imperfect nature of the 'market' for default funds, and because the new MySuper regulations will allow product tailoring and differential pricing, MySuper-compliance is a necessary but insufficient condition for a fund that wishes to be named as a default in an award. It is therefore appropriate to develop a selection process that builds on MySuper-compliance by combining input from those with expertise in superannuation or related fields with input from industrial stakeholders. This provision secures that objective.

Transitional process to permit retention of existing default funds. This provision recognises that there may be circumstances where it is in the interests of members for a newly excluded fund to be allowed to continue to receive default contributions for a transitional period. For some employers it may take time to identify a new fund appropriate to their circumstances and to put new administrative arrangements in place. It is therefore appropriate for the Commission to have discretion in this area.

Ongoing reform

The ACTU has made clear that the matters addressed by the Bill do not deal with a significant range of important issues advanced by unions to the Panel. As set out in our published response to the Panel's report, there are a number of recommendations that the ACTU and Affiliates strongly oppose. Further, there are a number of both broader reform areas and technical matters identified in our submissions to the Panel which we believe should be addressed.

The Minister has committed to ongoing discussions with NWRCC members concerning the review recommendations and other relevant matters, with a view to initiating additional legislation in 2013. We look forward to participating in this further consultation process.

Committee Process

The ACTU does not object to this submission being made public.

Please do not hesitate to contact us if we can assist the Committee further in its deliberations. If the Committee intends to conduct public hearings in relation to the Bill, the ACTU would welcome the opportunity to appear.

Yours faithfully,

TIM LYONS
Assistant Secretary