

COALITION SENATORS' DISSENTING REPORT

Introduction

1.1 Coalition Senators are highly disappointed that once again, the Government has rushed through the Committee a significant Bill that will affect each employer, employee and independent contractor in Australia without the Committee being able to conduct fulsome inquiries.

1.2 This Bill was introduced into the House of Representatives at 4.30pm on 30 October and called on for debate the next morning 31 October with a vote later that day. The Minister has made no explanation for the critical need for this legislation to be passed and the Department did not provide any explanation at the Hearing. While Coalition Senators have formed some views which are explored in this report, given the brief nature of the inquiry and the time constraints of the hearing it is noted that not all submissions have received the scrutiny they deserved. Should more time have been allowed, the Committee could have heard from more witnesses.

1.3 Coalition Senators are concerned that the Government has titled this Bill as the 'Fair Work Amendment Bill 2012' under the auspices of enacting recommendations from the Fair Work Review. Despite this deceptive title, this Bill also makes significant changes to the Fair Work Act in relation to the operation of Fair Work Australia, Modern Awards and Superannuation.

Recommendation

That the Senate Committee be given an opportunity to fully consider legislation prior to debate in the Senate.

Superannuation

1.4 Coalition Senators have long expressed concern about the Government's failure to address the current closed shop, anti-competitive arrangements for the selection of default funds under Modern Awards through Fair Work Australia. Sadly the amendments in this Bill will continue to propagate these closed-shop arrangements.

1.5 The current process for the selection of default funds under modern awards, initiated by this government and run by Fair Work Australia lacks transparency. It is littered with inherent conflicts and inappropriately favours union dominated industry super funds.

1.6 Coalition Senators welcomed the Government's belated recognition in its 2010 pre-election policy¹ on superannuation where they promised to introduce an open, transparent and competitive process to select default funds under modern awards.

1 Australian Labor Party, *Fairer, Simpler Superannuation*, 2010, Election Policy Document.

1.7 Despite this election commitment, it took Minister Shorten a considerable amount of time to ask the Productivity Commission to examine this important issue.

1.8 After pre-empting its final report, Minister Shorten then cherry-picked those aspects of the Productivity Commission's report that maintained the status-quo.

1.9 Coalition Senators are deeply disappointed that the government has introduced legislation into Parliament which, instead of ensuring genuine competition, will impose an additional layer of government intervention in the default fund market – particularly in light of the Government's election commitments.

1.10 The government has sought in this legislation to limit the number of MySuper products in Modern Awards to a maximum of 10, despite the Productivity Commission's clear recommendation that:

Recommendation 8.4

The number of default products listed in a given modern award should be at the discretion of the Default Superannuation Panel.²

1.11 Further, the government has ignored the Productivity Commission's findings in a number of areas including but not limited to:

- The Productivity Commission's proposed 'Default Superannuation Panel' will not be created as recommended - rather it will be subsumed into the existing Minimum Wage Panel;
- The new Panel is not the final decision maker under this Bill as recommended – instead the Full Bench of Fair Work Australia (FWA) will approve default funds in each award after a recommendation from the Expert Panel;
- The process of including funds in awards will only occur every 4 years starting in 2014 when Modern Awards are due for review - as opposed to an ongoing application process; and
- All awards must have default funds - currently there are 13 awards that do not list default funds.

1.12 Coalition Senators firmly believe that genuine competition in the default fund market is critically important to ensure efficiencies and value for Australians in default super funds are maximised. If passed by the Parliament, this would see the continuation of a process where conflicted parties within Fair Work Australia will continue to select default super funds under modern awards.

1.13 In submissions to the Committee, the Financial Services Council said:

We believe the market structure proposed in this Bill for default super / MySuper will limit competition in the \$1.4 trillion superannuation industry and result in reduced fee pressure and innovation for consumers.³

1.14 Coalition Senators also agree with the OECD:

2 Productivity Commission, *Default Funds in Modern Awards*, Final Report, p. 25.

3 FSC, *Submission 31*, p. 3.

All OECD countries rely fundamentally on competition in product markets to organise production. Competition stimulates innovation and efficiency in the use of resources, thereby leading to greater product diversification and lower prices. Therefore, competitive product markets are in the interest of all consumers.⁴

1.15 The government is currently also legislating through its various MySuper Bills all the consumer protection requirements it judges are important in a default fund product.

1.16 Given this matter is under active consideration, there is no reason why every product which qualifies as a MySuper product should not be able to compete freely in the default fund market. This will surely achieve the best outcome for employees.

1.17 The Government has provided no justification for the additional cost and complexity which comes with an additional layer of government intervention in that market.

1.18 Coalition Senators are troubled by submissions that express concerns about the Minister's consultation process. The Financial Services Council said:

We note that the Explanatory Memorandum indicates that: 'the Bill was developed following extensive consultation with superannuation industry stakeholders.....' This is incorrect. There was minimal consultation with the superannuation industry on this legislation. Apart from a single meeting held on 23 October 2012, there was no exposure draft legislation and therefore no consultation on the draft provisions. The first time the industry saw the legislation was when it was presented to Parliament.⁵

1.19 Given the Government's promise of open and transparent governance, this appears to be yet another example of a distinct lack of consultation. This, combined with the rushed nature of this inquiry and the speed at which this Bill is to be progressed through the Parliament, makes for bad decision making and leaves the effect of this Bill susceptible to unintended consequences.

1.20 Quite clearly, there are significant issues with the superannuation aspects of this Bill which will lead to poor outcomes for employers and employees alike, as evidenced in Qantas' submission:

There is no cogent rationale for changing the position as proposed in the Further MySuper Bill less than 2 months ago. Such removal will lead to inconsistencies and impact negatively on employers with employer-sponsored funds as discussed below.

1.21 Coalition Senators are deeply concerned that Minister Shorten has been so desperate to protect the vested interests of his friends in the union movement that he has lost sight of his responsibility as a Minister of the Crown to act in the public

4 The Organisation for Economic Co-operation and Development (OECD), *Competition: Economic Issues*.

5 FSC, *Submission 31*, p. 5.

interest.

Recommendation

1.22 That the Bill be amended to ensure that all MySuper products are eligible to be selected under the Modern Awards.

Fair Work Review

1.23 On December 20 last year, Minister Shorten finally announced the details for the review of the Fair Work Act. In doing so, he appointed three so-called ‘independent’ reviewers, Professor Ron McCallum, Dr John Edwards and the Hon. Michael Moore, who were given skewed and limited Terms of Reference, asking them to view the issues with blinkers on.

1.24 The Terms of Reference failed to incorporate vital ingredients of productivity, flexibility and union militancy but were clearly skewed to look in a particular narrowly focussed direction. Despite having the ‘independent’ Office of Best Practice Regulation attempting to allay Coalition Senators’ fears, documents obtained under Freedom of Information laws revealed that there was real concern within that office and the Department of Finance about the “narrow” scope of the review and the omission of productivity, the impact of union militancy and the cost impact on red tape.

1.25 Further Freedom of Information requests revealed that Mr Shorten only signed off on the Terms of Reference after political advisers had rewritten them to achieve Labor’s political goals.

1.26 Coalition Senators note that this is the Professor McCallum who recently predicted the Baillieu Government would lose the next election and praised the Leader of the Victorian Labor Opposition Daniel Andrews⁶ and who also said prior to his appointment to the panel that ‘only tinkering would be required to the Fair Work Act, which would stay in place for the next decade’.⁷ Such comments hardly inspire confidence that rigorous independent scrutiny would be applied to the review.

1.27 In May 2006 just two months after policies ‘dead, buried and cremated’ were introduced the good professor gave a very robust ideological account of the legislation, saying:

...it will make our workforce docile and bring in a neo-liberal hegemony into this country...

And

6 *Baillieu likely to lose election: McCallum*, AAP, 13 August 2012.

7 *Unpacking the Fair Work Act*, Professor Ron McCallum, 30 May 2011, www.hwlebsworth.com.au/latest-news-a-publications/publications/workplace-relations-and-safety/item/347-unpacking-the-fair-work-act.html

I fear for this country; I fear for the fact that workers are going to be in a perilous position. We are going to see, I think within a very short time, 30% of working women in part-time employment becoming part of the working poor.

1.28 As well as railing against the independent Australian Fair Pay Commission, including the trade union boss and community sector worker who were members as:

...full of what I would call neo-classical and neo-liberal economists...

1.29 Coalition Senators note that when it comes to the Fair Work Act after a full two years of operation Professor McCallum believes:

I think this act should be under scrutiny for a longer time...

1.30 Further the professor raged against the use of the Corporations power by the Coalition when in government but has been strangely silent on its use for the Fair Work Act.

1.31 Other members of the panel included: Dr John Edwards, a former political adviser to Paul Keating who went on to write a book titled *John Curtin: Australia's Greatest Prime Minister*. He apparently had not heard of Robert Menzies. It seems that in selecting the reviewers the most important consideration was their predisposition to the Labor school of thought.

1.32 Coalition Senators believe that the Terms of Reference deliberately excluded the vital ingredients of productivity, flexibility and union boss militancy and were clearly skewed towards a predetermined outcome. Despite the Review being a disappointing document on so many levels, Coalition Senators note that on certain issues the reviewers were mugged by stark realities.

1.33 The Coalition has flagged general support for the review.⁸

Vice Presidents of Fair Work Australia

1.34 This Bill also contains the creation of two additional Vice President positions at Fair Work Australia – two of the highest offices in the organisation. Mr Shorten has completely failed to explain why these additional positions are required or justified, apart from the Department's submission that the President of Fair Work Australia sought the additional roles. These two positions would slot in as the second and third most senior officers of the tribunal.

1.35 Since the announcement of these two additional positions, there has been widespread community concern, including from within Fair Work Australia.

1.36 The Australian Financial Review reported recently that:

In an email obtained by the Weekend Financial Review, Senior deputy president Les Kaufman wrote to Fair Work president Iain Ross on

8 Address to the Norton Rose Australia Employment Conference by Senator Eric Abetz, 31 August 2012.

Wednesday questioning the need for two positions, which reintroduces a level of seniority at the tribunal that was removed under the Fair Work Act in 2009.

He said the appointments would further erode the standing of the tribunal and "gives rise to the perception it is being stacked. Although I have no direct interest in the creation of the two new vice-president positions because, as you know my commission expires on December 1, I wish to express my dismay at what appears to be a retrograde step," Kaufman wrote to Justice Ross.

Deputy presidents Graeme Watson and Peter Richards have also written to Justice Ross over concerns the federal government will use the opportunity to install government-friendly appointees.⁹

1.37 Many submissions to the Committee expressed deep reservations about the inclusion of these two positions. Comments include:

From our perspective the need for the creation of these additional positions and the requirement that they be statutory positions is unclear. Neither the Fair Work Act Review Panel nor submissions to the review have identified the absence of these statutory positions as inhibiting the performance of Fair Work Australia.¹⁰

And:

This was not recommended by the Panel. It is unclear why these amendments are necessary or required and are opposed without amendments.

...

It is unclear why the existing Vice Presidents would not be suitable for reappointment to the new statutory Vice Presidential roles.¹¹

1.38 To this end, there was wide stakeholder support for the appointment of the two Members of Fair Work Australia titled as 'Vice President' to the new positions. Mr Steve Knott of AMMA told the Committee:

The legislation previously recognised the two existing vice presidents—Vice President Lawler and Vice President Watson—but the current legislation does not. The proposal is to have the legislation recognise those two roles once again and put two new people into those roles. It is a real pea-and-thimble trick. For those with long memories in industrial relations, we will go back to the late eighties when there was new legislation and everybody got appointed except one member of the tribunal, a fellow by the name of Justice Staples. I think this does give the opportunity—and, again, we have commented on this publicly—to really damage the independence

9 *Australian Financial Review*, 10 November 2012, p. 3.

10 *Submission 20*, p. 6.

11 *Submission 25*, p. 38.

or the perceived independence and impartiality of the tribunal. We have senior appointments made to the tribunal which, through the political cycle—there are people who are appointed by one side who may not be appointed by another side, but that is the way it goes over the fullness of time in the political cycle.

1.39 Coalition Senators are deeply concerned that the appointment of pro-Labor vice presidents would bring into question the tribunal's integrity which has already suffered considerable damage courtesy of the Health Services Union scandal.

1.40 In a significant submission, the Law Council of Australia said:

As a general principle, once a person has been appointed to sit on a Court or independent Tribunal with designated powers and privileges, any change that would have the effect of removing or reducing that particular person's powers or privileges while not affecting the powers and privileges of other Members of that Tribunal, has a tendency to undermine the independence of the Court or Tribunal.

Members of FWA are appointed to a quasi-judicial position. The status of FWA depends upon the independence and impartiality of its Members being maintained and being seen to be maintained.

...

Should the Government appoint the two individuals currently designated Vice President to the two statutory Vice President positions, then their status will not be reduced. However, if the two Deputy Presidents designated Vice Presidents are not so appointed, the effect of the Bill will be to reduce their status. Henceforth responsibilities that would have been capable of being delegated or given to them by nature of their senior status would instead be given to the new statutory Vice Presidents.

This would have the tendency to reduce the independence of the Tribunal in that it will reduce the role and privileges associated with particular individuals.¹²

1.41 Coalition Senators' strong view is that regardless of the views on Vice Presidents Watson and Lawler, in the interests of protecting the tribunal they should be appointed to the positions – consistent with submissions referenced in this Report.

1.42 It is noted that there has been public speculation¹³ about the appointment of such people as Mr Jeff Lawrence, Mr Josh Bornstein and Justice Michael Walton.

1.43 During the public hearing Mr John Kovacic, Deputy Secretary, DEEWR, emphasised that the positions had been created on the basis of a recommendation made by the President of Fair Work Australia, and that 'the positions will be publically advertised and will be subject to a merit based selection process consistent with government policy'.¹⁴

12 *Submission 29*, p. 4.

13 <http://catallaxyfiles.com/2012/11/17/shorten-delivers-for-his-mates/>

14 *Proof Committee Hansard*, 21 November 2012, p. 20.

1.44 Coalition Senators note that despite the Government's 'merit based selection' processes, and the promise before the 2007 election by then Labor Leader Kevin Rudd that:

I give you this as an absolute guarantee here on your program. I will not be prime minister of this country and appoint some endless tribe of trade union officials to staff or ex trade union officials to staff the key positions in this body. That's not my intention. That's not the way in which it's going to work.¹⁵

1.45 There has been an overwhelming number of people appointed to Fair Work Australia with a trade union pedigree, including in the last round Mr Bernie Riordan a former Electrical Trades Union official who mysteriously had civil proceedings against him settled the day before his appointment.

1.46 Despite the Explanatory Memorandum stating that there would be no cost associated with this Bill, Mr Kovacic stated:

There are costs, and those costs are to be absorbed by Fair Work Australia. It is difficult to be precise as to the actual cost, given that the Remuneration Tribunal is yet to determine remuneration for those positions. I think a ballpark figure in the order of \$1.5 million per annum is what we have been projecting.

1.47 The Coalition trusts that the resourcing of these positions will not come at the expense of Fair Work Australia's newly established branch to oversee the financial accountability and transparency of trade union bosses.

Recommendation

1.48 The creation of two additional Vice Presidents of Fair Work Australia be strongly opposed.

Recommendation

1.49 Should the positions be created, Vice Presidents Watson and Lawler be appointed to the positions.

'Fair Work Commission'

1.50 The Fair Work Review Panel's clear recommendation that:

The Panel recommends that the FW Act be amended to change the name of Fair Work Australia to a title which more aptly denotes its functions. It is recommended that the new title contain the word 'Commission' and that it no longer contain the words 'Fair Work'.¹⁶

15 Hon. Kevin Rudd MP, *7.30 Report*, 30 April 2007.

16 Fair Work Review Panel, Recommendation 50.

1.51 Despite this, Coalition Senators were somewhat surprised that the legislation seeks to change Fair Work Australia's name to 'Fair Work Commission' – in clear contradiction of the recommendation.

1.52 The Government has refused to provide any explanation for why this recommendation was partially rejected, however Mr Steve Knott from AMMA has been able to shed some light on this matter in his evidence to the Committee:

We understand, and you get this through the bush telegraph, that the very highest levels of government want the name Fair Work retained and it has now come forward and was put forward as a decision as opposed to a consultation issue that it will be the Fair Work Commission.¹⁷

1.53 It is clear that the Prime Minister herself intervened to protect the 'Fair Work' name in the title of the Commission, contrary to the recommendation of a million dollar review and the wishes of the President of Fair Work Australia.¹⁸

1.54 Coalition Senators note that there was widespread support for a change of name. the Maritime Workers Union submitted:

The MUA supports calls for further amendment of the name to its natural form...

...

The Commission has been and remains a cornerstone of a functioning Australian democracy and is renowned for its fair and efficient management of industrial relations following federation with the enactment of the Conciliation and Arbitration Act 1904.

As such, the Commission deserves a name that is recognised throughout Australia and should revert to its longstanding and accepted form.

1.55 Coalition Senators note that there is wide stakeholder support for the name being changed to 'Australian Workplace Relations Commission'.

Recommendation

1.56 The name of 'Fair Work Australia' be amended to 'Australian Workplace Relations Commission'.

Other recommendations

Barclay v. Bendigo TAFE

1.57 The High Court's unanimous judgement in the Barclay v. Bendigo TAFE case found that union bosses should not be an untouchable class in the workplace – something also recommended by the Review Panel.

¹⁷ *Proof Committee Hansard*, 21 November 2012, p. 10.

¹⁸ *Proof Estimates Hansard*, 28 May 2012, p. 52.

1.58 Coalition Senators welcome the High Court decision and the Fair Work Panel Review's recommendation to this end.¹⁹

1.59 However, Coalition Senators found it disappointing and emblematic that Labor, through Minister Shorten, intervened in the High Court on the side of the union boss, Mr Barclay, arguing that it actually was the intention of the Fair Work Act to make union bosses untouchable even if they did the wrong thing.

1.60 Labor intervened in Barclay using more than \$160 000²⁰ of taxpayers' money to argue for the union bosses against a taxpayer funded education institution.

1.61 Indeed, in a damning judgement by High Court Justice Heydon, it has now been confirmed that Mr Shorten acted as an ex-union boss first and Minister of the Crown second after foolishly intervening on the side of the Australian Education Union in the Barclay v. Bendigo TAFE case.

1.62 Justice Heydon said:

...the Minister's stance before and during the oral hearing was not that of an intervener, but that of a partisan. For example, some of the Minister's oral submissions were directed to factual material. This is hardly the province of an intervener...²¹

1.63 The Committee was told by Ms Lisa Matthews of AMMA:

That (this recommendation) is a step in the right direction and we would have liked to have seen that in this current round of reforms.

1.64 Coalition Senators are disappointed that the Government did not use the 'first tranche' to enshrine this recommendation into legislation that would ensure that union bosses are treated the same as all other employees in the workplace.

1.65 There is broad concern in the community in relation to reports²² that the Government will give union representatives and members a new avenue to sue for alleged discrimination against them when acting in that capacity under changes to discrimination laws announced Attorney-General Ms Nicola Roxon.

1.66 Coalition Senators are concerned that the new legislation would allow for expanded protections for union bosses who do the wrong thing in the workplace, despite the High Court's judgement in the Barclay v. Bendigo TAFE case and the Fair Work Review Panel recommendation.

19 Recommendation 47.

20 *Proof Estimates Hansard*, 17 October 2012, p. 107.

21 Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2] [2012] HCA 42 (3 October 2012).

22 Union ties 'basis for discrimination', *The Australian*, 22 November 2012, p. 1.

JJ Richards

1.67 Then Opposition Leader Kevin Rudd pledged, that the Fair Work Act would not allow the return of ‘strike first, talk later’. Yet, the decision of the Federal Court in the JJ Richards case tells a different story.

1.68 The Federal Court’s judgment accepts that the argument advanced on behalf of JJ Richards was understandable and reasonable but for the specific wording in the Fair Work Act which entitles unions to obtain protected action ballots in circumstances where most reasonable people would argue that should not be allowed.

1.69 The Government is yet to tell us whether this was simply a drafting error or that Labor deliberately misled the Australian people. Their silence is interesting and causes Coalition Senators to suspect the latter.

1.70 When asked at the Hearing, Mr John Kovacic of the Department, said:

Without having seen the appearances of the early witnesses this evening, I would imagine it is a reasonable expectation that there might have been differing views as to the approach on those recommendations. That was consistent with what emerged in the consultations that the minister convened around the panel’s report, where there was clearly not a consensus view around on how to respond to those particular recommendations. As I mentioned in the opening statement, this bill really reflects those recommendations where there is a consensus...²³

1.71 Coalition Senators believe that if the provisions of this case had exposed a drafting error, the Government would move with some speed to implement the stated policy that received electoral support at the 2007 election. Coalition Senators are concerned that, should the Government not rectify this, it will be viewed as a broken promise in a similar vein to the Carbon Tax that Australia had to have despite promises to the contrary in 2010.

Recommendation

1.72 Fair Work Review Panel Recommendations 31 and 47 be implemented as soon as practically possible.

Key Performance Indicators

1.73 Coalition Senators are concerned that despite some of the amendments in this Bill coming out of the Fair Work Review’s Post-Implementation Review, witnesses could not point to these amendments leading to any substantive increases to the Government’s Key Performance Indicators²⁴ for the Fair Work Act.

1.74 Mr Daniel Mammone from the Australian Chamber of Commerce and Industry told the Committee in relation to the key performance indicator of Working Days Lost due to Industrial Disputes:

23 *Proof Committee Hansard*, 21 November 2012, p. 23.

24 Department of Education, Employment and Workplace Relations, *Annual Report 2011–12*.

So, in terms of the first tranche response bill, there are no changes in terms of the restrictions on taking protected industrial action per se.²⁵

1.75 While there was evidence from the Australian Council of Trade Unions, consistent with public statements from the Minister for Employment and Workplace Relations that:

Taking a longer term view (see figures below), it is clear that current levels of industrial disputes are at historically very low levels even when one takes into account the peaks associated with large bargaining rounds.²⁶

1.76 Coalition Senators note that the most recent Industrial Disputes data released by the Australian Bureau of Statistics reveals an 8 year high on working days lost due to industrial action. It is clear that both the Minister and the ACTU have used a very long term view to try and misconstrue the statistics. This dishonest approach does not allow for a transparent industrial relations debate.

1.77 Coalition Senators note that the 293 100 working days lost due to industrial action is the equivalent of 1,221 people sitting out on strike for a whole year. Avoiding such an outcome would lead to a significant productivity improvement.

1.78 In relation to another Key Performance Indicator, productivity, Ms Lisa Matthews of AMMA said:

In relation to productivity improvements, we cannot really see any of the aspects of the bill adding to industry productivity.

1.79 While the first tranche legislation will make changes around the edges, Coalition Senators are disappointed that the Government hasn't taken this opportunity to address the militancy, flexibility nor productivity problems that have been unleashed in the wider community courtesy of this Act.

Conclusion

1.80 While having broad-ranging concerns with this Bill, Coalition Senators believe the concerns can be addressed with relatively minor amendments.

Recommendation

1.81 The Senate amend the Bill in line with recommendations in this report.

Senator Chris Back
Deputy Chair

Senator Bridget McKenzie

25 *Proof Committee Hansard*, 21 November 2012, p. 3.

26 Answer to Question on Notice.