

LABOR SENATORS' DISSENTING REPORT

Introduction

- 1.1 Labor Senators oppose the Fair Work Amendment Bill 2014 (the Bill).
- 1.2 Labor Senators note that the Bill contains a range of amendments to the Fair Work Act 2009 (the Act) that will have a detrimental impact on Australian workers and their families.

Individual flexibility arrangements (IFAs)

- 1.3 The Bill removes a key safeguard when it comes to what can be traded away under an IFA. The relevant Expert Panel recommendation states that if a non-monetary benefit is being traded for a monetary benefit, the value of the monetary foregone must be relatively insignificant, and the value of the non-monetary benefit is proportionate. Despite this clear prescription, 'relative insignificance' and 'proportion' are missing from the amended Bill.
- 1.4 The current law in the area is very clear and was most recently re-stated by a Full Bench of the Commission. The Commission stated that if you don't pay the additional rate at the time the award says it should be paid to you (monetary element), that arrangement does not leave you better off overall, even though it might suit your personal circumstances to work at that time (non-monetary element).
- 1.5 There exists no assurance that the employee is provided with information about what they are trading off, and the value of what they are losing – especially if the “flexibility” is proposed by the employer and not requested by the employee. Evidence was given in the hearing to this point:

CHAIR: But it also does grant great flexibility. Even in the example you gave, there may well be a circumstance in which the person you mentioned finds that to be of greater convenience to them; might it not?

Mr Lyons: There are two points about that. Firstly, this bill does not even require the penalty rate that person would be giving up to be ever quantified to the person—and I do not think it is contested, by the way, that it does not have to be quantified in dollar terms, because I have specifically requested of the minister that a requirement associated with a dollar be inserted in the bill and he has declined to do it. The document itself only needs to say: 'This IFA varies clause 39 of the award that deals with Sunday work.' That is what it needs to say. It does not need to say how it does it or quantify that in any way. So a worker can end up signing this without any real understanding—and remembering they have no comeback about this and

no-one else ever looks at it—of what they are actually giving up. That is our complaint.¹

1.6 In evidence given at the hearing into the Bill, the Department of Employment made reference to "retaining all existing protections for employees" and not changing the existing law regarding non-monetary benefits.² Labor Senators oppose this evidence.

1.7 The Bill fails to address defective IFAs, which are addressed under the existing law. An IFA may be defective for one of the following reasons:

- It wasn't genuinely agreed to;
- The employer hasn't ensured that it leaves the worker better off overall
- The employer hasn't ensured that the IFA is reduced to writing and signed by the worker
- The employer hasn't ensured that they gave a copy of the IFA to the employee.

1.8 Where an IFA is defective, the law deems this to be a breach not of the IFA, but of the term of the award or the agreement that permitted to be made in first place (see sections 145(3) [awards] and 204(3) [collective agreements]), which affords an employee the opportunity to take action in court for penalties and compensation (section 545).

1.9 Compensation in such a case would be judged on how much has the worker lost as a result of them being made worse off as compared to the award/agreement under which the IFA was made. The overlay of the genuine needs statement and the defence significantly weakens this. The 'genuine needs statement' process only acts to protect the employer against action from the employee, rather than the employee's rights, despite the Department stressing that this would add additional protection for employees³. Labor Senators cannot envisage situations where the employee would be afforded any additional protections, rather the opposite. The "genuine needs statement" serves only to bolster an employer's defence to a prosecution:

Because each IFA will now include a testimonial from the worker about how it meets their needs and leaves them better off overall, employers are likely to rely on that testimonial to demonstrate their "reasonable belief" for the purposes of the defence. A successful defence will result in no exposure to a penalty, and no requirement to remedy any underpayment.⁴

1 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p.7.

2 Ms Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p.12.

3 Ms Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p.12.

4 Australian Council of Trade Unions (ACTU), Submission 20, p. 21.

1.10 Additionally, the “genuine needs statement” fails to provide any protection for employees following execution of the statement, regardless of information learnt post-execution, and without any lodgement or oversight, fails to provide protection for workers’ minimum conditions:

Senator LINES: Are you saying that if I am the worker and I sign an individual flexibility agreement that takes my penalty rate away on a Sunday, and I sign a statement that says that I am better off and then I am found not to be better off, there is no comeback on the employer, there is no compensation? Is that what you said?

Mr Clarke: Correct. That is the way that this bill operates and indeed it is not just us saying that. VECCI, I think it was, in their submission applauded the bill for that impact of insulating employers from prosecutions.⁵

Labor Senators’ view

1.11 The Labor Senators of the committee are not persuaded by evidence from the Department of Employment that all existing protections for employees are retained under the amendment.

1.12 The Labor Senators of the committee are not persuaded by evidence from submitters that the “genuine needs statement” outlined in the amendment provides any protection for employees, and trades off employees rights in the workplace under the guise of flexibility.

1.13 The Labor Senators of the committee accept the evidence that no assurance has been given by the Department that the employee is provided with information about what they are trading off. Labor Senators assert this targets low-paid workers, workers with limited access to formal education, and other vulnerable groups of workers who are left unrepresented at the mercy of informed employers.

Greenfields Agreements

1.14 The proposed changes to the Greenfields agreement making process contained in the Bill are heavily skewed in favour of employers.

1.15 In essence, the Bill will extend good faith bargaining rules to the negotiation of greenfields agreements. For example, employers and unions would be required to participate in meetings with each other. Labor Senators are not oppose to this, except in that evidence given by The Department of Employment stated that unions are too easily able to frustrate the making of greenfields agreements. Labor Senators assert that the changes to the way Greenfields agreements are made essentially pave the way for employers to make agreements with themselves, and seek only to remove unions from the bargaining table.

5 Mr Clarke, Director, Industrial and Research, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 4.

1.16 The 2012 Review recommended that the Fair Work Act be amended to require employers intending to negotiate a Greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.⁶ This Bill fails to address this recommendation. The Bill establishes a new optional three month negotiation timeframe, which was not a recommendation from the review, wherein if agreement can't be reached within the time, the employer and the employer only will be able to take its proposed agreement to the Fair Work Commission for approval. These proposed changes create a situation where employers can simply 'run down the clock' on bargaining with employees, meaning the employer could essentially walk away from the negotiating table and await the expiry of the period. Evidence given by the ACTU at the hearing outlined issues with the three-month negotiation timeframe, and the skewing of the benefits afforded by the amendment to the employer:

Mr Lyons: ...The other thing, frankly, is these are very sophisticated employers that will use these provisions; they are the big end of town represented by sophisticated law firms and IR practitioners. Anybody that cannot pretend they are bargaining in good faith for three months is not trying. So there will not be any of those orders. Even if there were, they go away at the end of the three-month clock.⁷

1.17 Evidence submitted by the Ai Group confirms that some employers would utilise this amendment to the extent of the above, and that they expect unions would utilise it in the same way, to the detriment of workers.⁸

Labor Senators' view

1.18 The Labor Senators of the committee are not persuaded by evidence from submitters that the amendment to Greenfields agreements will benefit workers and improve timeliness.

1.19 The Labor Senators of the committee note that this amendment may be more acceptable should Recommendation 30 of the Expert Panel replace the current proposed amendments to the bill. Recommendation 30 provides that:

...when negotiations for a [...] greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party conduct a limited form of arbitration including 'last offer' arbitration to determine the content of the agreement.⁹

6 Report of the Fair Work Act Review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, 2012, p. 172.

7 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 9.

8 Australian Industry Group (Ai Group), *Submission 23*, p.10.

9 Report of the Fair Work Act Review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, 2012, pp 180-190.

The bill undermines the right to organise and be represented by a union

1.20 Labor Senators believe that all Australian workers have a right to union representation and unions should have fair access to work sites. Contrary to the very clear commitment given in the Coalition policy, there is no explicit right (conditional or otherwise) given where the union is a bargaining representative within the Bill. The Expert Panel's recommendation provided that there must be a balance between the rights of unions to represent their members and the rights of employers to conduct their business.¹⁰ The Bill's proposed changes to right of entry are heavily weighted in favour of employers and therefore unacceptable.

1.21 Labor Senators believe in freedom of association. If a worker does choose to be a part of a union, it's important that the unions are able to represent them. The amendments have the effect of making it harder for employees to access their union in the workplace, and therefore undermine freedom of association.

1.22 Labor Senators have serious concerns about the 'invitation certificate' process the Government is proposing. This will enable the union to obtain a certificate from the Commission to the effect that the *Commission is satisfied* that there is a member or prospective member that the union is entitled to represent who has invited the union to send a representative on site for the purposes of holding discussions. Such certificates, however, will have expiry dates which will be constrained by as yet unpublished regulations. No provision actually requires that an employer or occupier take notice of an Invitation Certificate.

1.23 There has been some attempt to ameliorate the very obvious difficulty of proving a member or prospective member has invited the union on site, and to ensure the anonymity of that worker. Labor Senators support the submission of the Community and Public Sector Union (CPSU) on the matter, who state that:

Some employers will use these amendments to unreasonably delay entry by a union. The requirement that a union be invited in by a member or potential member also creates the capacity for implicit and/or explicit intimidation of the workforce.¹¹

1.24 The assertion by the Department of Employment that the Fair Work Review Panel had found increased entries "had time and cost impacts for employers and for the productivity of the economy"¹² is simply untrue. The Fair Work Review Panel's discussion regarding right of entry makes absolutely no finding regarding productivity impacts. In fact, the report noted that:

An increased capacity for entry rights to be exercised was a deliberate policy change in the FW Act compared to WorkChoices and was true to the FW Act's objectives

10 Fair Work Amendment Bill 2013, Part 3-4, p. 6.

11 Community and Public Sector Union (CPSU), *Submission 2*, p. 3.

12 Ms Parker, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment, *Proof Committee Hansard*, 14 May 2014, p. 11.

...

The FW Act was designed to overcome this very issue, and we therefore consider that it would be inconsistent with the objects of the FW Act to amend it.¹³

Labor Senators' view

1.25 The Labor Senators of the committee have demonstrated as above that the evidence given by the Department regarding the impact on time and costs should be discounted.

1.26 The Labor Senators of the committee accepts the evidence that the Bill undermines the right to organise and for workers to be represented by a union.

The Bill fails to allow proper scrutiny of process in changes to Paid Parental Leave

1.27 Labor Senators note that the provisions of the Act as they currently stand appropriately govern unpaid parental leave, and provide a right for an employee to request an extension of the period of parental leave they are otherwise entitled to, by up to twelve months.

1.28 The Bill would change the present position by prohibiting the employer from refusing an employee's request unless the employer has first given the employee a reasonable opportunity to discuss the request. While Labor Senators support the idea of employers being compelled to discuss requests made with employees, the right to request must be underscored by an effective right of review that ensures that requests for flexible working arrangements are given proper consideration and that a refusal is indeed due to reasonable business grounds.

1.29 Evidence presented by the Australian Council of Trade Unions (ACTU) cites research conducted by the General Manager of Fair Work Australia indicating that the majority (93.3%) of requests for extensions of unpaid parental leave are being granted, yet there a small proportion of eligible employees may not make a request because due to concerns about the negative effects on their employment or their relationship with their employer (11.1%) or had a verbal request refused by their employer (2.2%).¹⁴

13 Report of the Fair Work Act Review Panel, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, 2012, p. 173.

14 *General Manager's Report into the operation of the provisions of the NES relating to requests for flexible working arrangements and extensions of unpaid parental leave: 2009-2012*, November 2012, p. 66, As cited in Australian Council of Trade Unions (ACTU), *Submission 20*, p. 3.

Labor Senators' view

1.30 Labor Senators reject this amendment due to the failure of the Bill to provide appropriate scrutiny of the process.

Payment for Annual Leave

1.31 Labor Senators stress that the wording as per the Bill are open to interpretative arguments. Employees should not be financially disadvantaged because they have not taken their full entitlement to paid annual leave at the time their employment ends.

Labor Senators' view

1.32 Labor Senators agree that if the current requirement to pay at the full rate of pay were included in the Bill's proposed s 90(2) and the words relating to payment being calculated at the full rate of pay immediately before the date of termination, the provision would be acceptable.

The bill allows agreements to be made in secret with no access to an independent arbiter or independent scrutiny

1.33 Amendments as recommended would allow IFAs to be made in secret, with no requirement for lodgement of agreements, or scrutiny of the content or process. The ACTU expressed their concerns regarding this matter during hearings:

Mr Lyons: AWAs were never publicly published, but they were required to be lodged with a government agency, which had various levels of tests associated with those, and there was analysis and benchmarking done associated with that. The mere fact of an employer having to send it to the Commonwealth has a certain deterrent effect from the worst types of abuse, but these are things that will live in a filing cabinet. You have workers signing up to them who have never been told what it is they are signing away. They are effectively signing away their own rights to make a claim that they were ripped off, and there will be no way of ever finding out about it.¹⁵

1.34 Recommendation 10 of the Fair Work Review Panel would enable the Fair Work Ombudsman to investigate as to whether IFAs were being abused by a particular employer or employers in a particular industry.

Mr Lyons: ... The point that Mr Clarke made in answer to a question from Senator Lines was that the recommendation the coalition says it is

15 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 4.

implementing here from the Fair Work Act review panel said that an employer using one of these devices should notify the Fair Work Ombudsman that they have done it, so at least the Fair Work Ombudsman knows. If it is saw 5,000 of them in little shops in North Queensland or something you might think, 'Well, maybe there is something going on here. We can go and have a bit of a look and use our powers.' But it is secret in the sense that these things are done and they allow people to be excised from key aspects of the safety net set by modern awards.¹⁶

Labor Senators' view

1.35 The Labor Senators of the committee support the deterrent effect of lodging IFA's, regardless of whether the IFA's are published publicly, and notes the Government's failure to incorporate the Expert Panel's recommendation 10 into the amendments.

1.36 The Labor Senators of the committee accepts the evidence that independent scrutiny of IFA's are essential in keeping employers accountable, and protecting worker's rights in the workplace.

Conclusion

1.37 Labor Senators report that the Bill represents a race to the bottom on labour standards and is not meritorious for workers. This is a return to WorkChoices by stealth.

1.38 These amendments are unnecessary and complicated, and put Australian jobs at risk.

1.39 The bill unfairly targets low-paid workers, workers with limited access to formal education, and other vulnerable groups of workers who are left unrepresented at the mercy of informed employers.

Recommendation 1

1.40 Labor Senators recommend that the Senate reject the Bill.

Senator Sue Lines
Deputy Chair, Legislation

Senator Mehmet Tillem

16 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 14 May 2014, p. 4.