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## RESPONSE TO QUESTIONS ON NOTICE

### Fair Work Amendment (Bargaining Processes) Bill 2014

20 March 2015

#### Department of Employment

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*Extract from Proof Hansard, page 36:*

**Senator LINES:** Which employer groups are part of COIL?

**Mr Cully:** I do not know if we have the list of who actually participated in this COIL, but generally speaking there are representatives from ACCI, the Australian Industry Group, the Business Council and, I think as part of the ACCI representation, some of the ACCI affiliates—so, quite often, the National Farmers Federation would be a party as would the Master Builders Association. On the union side it is the ACTU and whichever affiliates it thinks need to attend.

**Senator LINES:** I am not sure if Dr Morehead has it there, but can you take on notice, if you do not have it here this morning, who was there?

**Mr Cully:** We will take that on notice.

*Response from the Department of Employment:*

Australian Mines and Metals Association  
National Farmers' Federation  
Business Council of Australia  
Australian Manufacturing Workers' Union  
Australian Workers' Union  
Australian Industry Group  
Australian Council of Trade Unions  
Master Builders Australia  
Australian Chamber of Commerce and Industry

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*Extract from Proof Hansard, page 36:*

**Senator LINES:** How does that advice get to the minister? Do you write up a paper post the COIL meetings?

**Mr O'Sullivan:** I cannot remember whether the representative from the minister's office was present at that particular COIL.

**Senator LINES:** You would normally have a rep there from the minister's office?

**Mr O'Sullivan:** Yes.

**Senator LINES:** You can take that on notice and let us know.

*Response from the Department of Employment:*

Two representatives from the Minister's Office attended the meeting.

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*Extract from Proof Hansard, page 37:*

**Senator LINES:** Did you provide written advice?

**Mr O'Sullivan:** I cannot recall whether we provided written advice, but my suspicion is we provided oral advice and that might have been reproduced.

**Senator LINES:** Yes, Dr Morehead said that.

**Dr Morehead:** We were all in it together.

**Senator LINES:** Can you take on notice whether you provided written advice?

**Mr O'Sullivan:** We can take that on notice.

**Senator LINES:** And, if you did, what form that advice took?

**Mr O'Sullivan:** We will take that question on notice.

*Response from the Department of Employment:*

Advice was provided. Such advice took the form of oral and written legal advice.

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**Senator lines submitted in writing on 23 March 2015.**

The Explanatory Memorandum (EM) states that the Bill engages the right to freedom of association under Article 8(1) and the right to strike under Article 8(1) of the ICESCR.

The EM further states the Bill engages rights protected by the ILO freedom of association and protects the right of employees to collectively bargain.

When considering the Bill, the Parliamentary Joint Committee on Human Rights reported as follows;

*On the amendment of current subsection 443(2)*

1.30 The committee considers that this measure engages and potentially limits the right to freedom of association and the right to form trade unions (specifically, the right to strike).

*On the right to form trade unions (right to strike)*

1.34 The committee considers that the measure engages and limits the right to freedom of association and the right to form trade unions (right to strike) as it places further limits on when approval to undertake protected industrial action (that is, strike action) may be granted.  
and;

1.38 Accordingly, the committee considers that the statement of compatibility has not demonstrated that the objective of the measure may be considered a legitimate objective for the purpose of international human rights law, having regard to the nature of the rights themselves and the nature of permissible limitations. The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

*Question:*

**I ask of the Department; why has the Department stated in the Explanatory Memorandum that these measures do not limit rights in relation to ILO protections?**

*Answer:*

There is no such statement in the Explanatory Memorandum. The Statement of Compatibility with Human Rights (the Statement of Compatibility) to the Fair Work (Bargaining Processes) Bill 2014 (the Bill) acknowledges that the Bill engages certain human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that the amendments may limit (or are said to limit) those rights, the Statement of Compatibility establishes that these measures are reasonable, necessary and proportionate to achieving the legitimate objectives of the Bill (refer to pages iv and v for details).

The Department notes that the Parliamentary Joint Committee on Human Rights has requested further information in relation to the Bill. This is not an unusual request. Similar examination and requests have been made in relation to numerous other Bills in its *Nineteenth report of the 44th Parliament*.

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*Question:*

**I ask of the Department; why has the Department stated in the Explanatory Memorandum that these changes protect the rights of employees to collectively bargain?**

*Answer:*

The relevant paragraph of the Statement provides:

In addition, the Bill engages rights protected by the International Labour Organisation (ILO) *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)*, which protects the right to organise and the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, which protects the right of employees to collectively bargain for terms and conditions of employment.

The Statement of Compatibility notes that in relation to the amendments to the enterprise agreement approval requirements, '[t]hese amendments are intended to enhance collective bargaining by promoting discussions about improving productivity at the workplace level' (page iv).

Collective bargaining under the *Fair Work Act 2009* is premised on bargaining at the enterprise level between employers and employees, with the objective of making 'enterprise agreements that deliver productivity benefits' (see section 171 of the *Fair Work Act 2009*). This is the basis on which the statement on page iv is made. The justification for these measures is outlined in the Statement of Compatibility (page iv).

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