Fair Work Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 27 February 2014

Purpose

1.43 The bill proposes amendments to the *Fair Work Act 2009* (FWA) to implement elements of *The Coalition's Policy to Improve the Fair Work Laws*. Specifically, the bill seeks to gives effect to a number of recommendations made in the report of the Fair Work Act Review Panel.[1]

1.44 The bill proposes to make a number of changes to the FWA including to:

- provide that an employer must not refuse a request for extended unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request;
- provide that, on termination of employment, untaken annual leave is paid out as provided by the applicable industrial instrument;
- provide that an employee cannot take or accrue leave under the FWA during a period in which the employee is absent from work and in receipt of workers' compensation;
- amends flexibility terms in modern awards and enterprise agreements;
- confirm that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employee is better off overall under an individual flexibility agreement;
- establish a new process for the negotiation of single-enterprise greenfields agreements;
- amend the right of entry framework of the FWA;
- provide that an application for a protected action ballot order cannot be made unless bargaining has commenced;
- provide that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application under section 399A or section 587; and
- provide for the Fair Work Ombudsman to pay interest on unclaimed monies.

---

1 See Professor Emeritus Ron McCallum AO, The Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2012).

Background

1.45 The bill was the subject of an inquiry by the Senate Education and Employment Legislation Committee, which reported on 5 June 2014.[2]

Committee view on compatibility

1.46 The principal rights engaged by this bill are the right to just and favourable conditions of work, freedom of association and the right to organise and bargain collectively.

Right to just and favourable conditions of work

1.47 The right to the enjoyment of just and favourable conditions of work is guaranteed by article 7 of the ICESCR. The right encompasses a number of elements, including:

- remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind;
- safe and healthy working conditions;
- equal opportunity to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and
- rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

1.48 In addition, article 10(2) of the ICESCR provides that special protection should be accorded to mothers during a reasonable period before and after childbirth, with working mothers accorded paid leave or leave with adequate social security benefits during such a period. Article 11(2) of the of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States parties to take appropriate measures to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.[3] Finally, article 18(1) of the CRC states that States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

---

2 Senate Education and Employment Legislation Committee, *Fair Work Amendment Bill 2014 [Provisions]* (5 June 2014).

3 Article 5(b) of the CEDAW Convention further provides that 'States parties shall take all appropriate measures…(b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.'

1.49 The committee notes that the right to just and favourable conditions of work are not absolute, and that the rights may therefore be subject to limitations. Article 4 of ICESCR provides that permissible limitations are those that are 'determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. Where a measure may limit a right, the committee's assessment of the measure's compatibility with human rights is based on three key questions: whether the limitation is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective and whether the limitation is proportionate to that objective.

Inability to review decision to refuse extensions of parental leave

1.50 The FWA provides that an eligible employee is entitled to at least 12 months of unpaid parental leave. An employee may request an additional period of unpaid parental leave of up to 12 months. The employer may refuse a request 'only on reasonable business grounds.' The bill will provide that an employer must not refuse a request for additional parental leave 'unless the employer has given the employee a reasonable opportunity to discuss the request.' The committee considers that this amendment is likely to promote enjoyment of the right to just and favourable conditions of work.

1.51 The proposed amendments do not, however, provide for a right of review of an employer's decision to refuse an extension of unpaid parental leave beyond 12 months. The regulatory impact statement notes that about five per cent of applications for the extension of periods of unpaid parental leave since 2010 had been refused. Whilst this rate of refusal is quite low, it is not clear to the committee why it would not be appropriate to provide for review of a refusal to grant such an application.

1.52 The committee therefore requests the Minister for Employment's advice as to the compatibility of the measure with the right to just and favourable conditions of work.

Removal of payment of annual leave loading on termination of employment

1.53 The bill proposes to amend FWA to provide that on termination of employment, accrued annual leave is paid to the employee at the employee's base rate of pay without an annual leave loading. The explanatory memorandum states:

> The amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable

> modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.[4]

1.54 The RIS also states that the amendment would 'provide clarity to employers and employees, avoiding disputes that may arise because of a lack of awareness that the longstanding position had been displaced by the FWA.'[5] The statement of compatibility states that the amendments are consistent with article 7 of the ICESCR 'because the NES continues to ensure that employees receive remuneration that provides for fair wages and a decent living, consistent with Article 7 of the ICESCR.'[6]

1.55 The committee notes that the effect of the amendment would appear to be a reduction in the entitlements of employees who are currently eligible for annual leave loading upon termination of employment. The RIS notes that for various reasons it was not possible to determine how many employees are currently entitled to annual leave loadings on termination.[7]

1.56 In the committee's view, the potential loss on termination of employment of a 17.5 per cent leave loading is to be viewed either as a limitation on the enjoyment of the right to just and favourable conditions of work or a retrogressive measure. The committee has consistently requested that where a limitation on a right or a retrogressive measure is proposed, a clear justification for the measure be provided. This involves an identification of the objective being pursued by the measure, whether there is a rational connection between the measure and the achievement of the objective, and whether overall the measure is a reasonable and proportionate measure for the achievement of the goal. This assessment also includes consideration whether other measures less restrictive of the rights in question that would have achieved the same achieved the objective were considered and why they were not adopted.

1.57 The committee therefore requests the Minster for Employment's advice as to:

- **whether the proposed limitation on the right to just and favourable conditions of work is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is proportionate to that objective.**

4 Explanatory memorandum, p 3, para 12.

5 Explanatory memorandum , Regulatory Impact Statement, p xxxv

6 Statement of compatibility, p lii.

7 Explanatory memorandum , Regulatory Impact Statement, p xxxv.

Restrictions on taking or accruing leave while receiving workers' compensation

1.58 The bill proposes to amend the FWA so that an employee who is absent from work on workers' compensation will not be able to take or accrue leave during the compensation period. The statement of compatibility states:

> This amendment engages but does not limit human rights because the NES continues to ensure that employees receive remuneration that provides for fair wages and a decent living, consistent with Article 7 of the ICESCR. Rather, the amendment ensures that all employees in the national system have the same entitlements in relation to the taking or accrual of leave during a period in which the employee is in receipt of workers' compensation.[8]

1.59 The committee notes that the proposed amendment appears to seek to achieve the goals of clarity and uniformity of the conditions that national system employees enjoy by reducing the entitlements of some of those employees. The committee considers that this may be viewed either as a limitation on the enjoyment of the right to just and favourable conditions of work or a retrogressive measure. As noted above, the committee has consistently requested that where a limitation on a right or a retrogressive measure is proposed, that a clear justification for the measure be provided. This involves an identification of the objective being pursued by the measure, whether there is a rational connection between the measure and the achievement of the objective, and whether overall the measure is a reasonable and proportionate measure for the achievement of the goal. This assessment also includes consideration of whether other measures less restrictive of the rights in question that would have achieved the objective were considered and why they were not adopted.

1.60 The committee therefore requests the Minister for Employment's advice as to:

- **whether the proposed changes to the eligibility of some workers to take or accrue annual leave while on workers' compensation is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

---

8 Statement of compatibility, p liii.

Individual flexibility arrangements – potential reductions in the better off overall test'

1.61 The FWA requires the inclusion in all awards and enterprise agreements of a 'flexibility term' that enables an employee and his or her employee to agree on an arrangement (an 'individual flexibility arrangement' or IFA) varying the effect of the award or agreement, in order to meet the genuine needs of the employee and employer.[9] In order for such an arrangement to be valid, it must satisfy a number of tests, including that any IFA 'must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to' (the 'better off overall test').[10]

1.62 The bill would provide that where an enterprise agreement includes terms dealing with one of five matters, these terms may be varied by an IFA.[11] The statement of compatibility notes that the bill responds to recommendation 9 of the Fair Work Act Review Panel. However, the statement of compatibility does not explain why that recommendation was not adopted in the form recommended by the Review Panel, nor why the associated recommendation 10, which was designed to protect employees against potential misuse of IFAs, has not been implemented.[12]

1.63 The committee recognises that the availability of IFAs under both awards and enterprise agreements have the potential to benefit both employees and employers, but notes that a difference in relative bargaining power may in some cases give rise to a possibility that the provision of a non-monetary benefit in exchange for a monetary benefit may not be to the overall benefit of the employee. The committee notes that in such cases there might be a failure to guarantee the right to just and favourable working conditions guaranteed in article 7 of the ICESCR.

1.64 The committee thus considers that the bill may in certain circumstances constitute a limitation on the right to just and favourable conditions of work. Accordingly, the committee's expectation is that the statement of compatibility should set out the legitimate objective being pursued, whether there is a rational connection between the measure and the achievement of the objective, and whether the measure is a reasonable and proportionate one. The evaluation of whether a measure is proportionate involves consideration of whether other

---

9 FWA, s 144(1) (awards) and 202(1) (agreements).

10 FWA, s 144(4)(c) and 203(4).

11 These matters are: arrangements about when work is performed; overtime rates; penalty rates; allowances; and leave loading.

12 In its Recommendation 10 the Review Panel proposed that an employer should be required to notify the FWO in writing of any IFA entered into at the time it is made, as this 'would enable the FWO to investigate, as and when required at its absolute discretion, whether the opportunity afforded by the FW Act to make these arrangements was being abused by a particular employer or employers in a particular industry.' See Fair Work Review p 109.

measures less restrictive of the rights in question that would have achieved the objective were considered and why they were not adopted.

1.65 The committee therefore requests the Minster for Employment's advice as to whether the proposed amendments to the Act in relation to IFAs are a reasonable and proportionate limitation on the right to just and favourable conditions of work.

Freedom of association

1.66 The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association. Examples are political parties, professional or sporting clubs, non-governmental organisations and trade unions. The right to form and join trade unions is specifically protected in article 8 of the ICESCR. It is also protected in International Labour Organization (ILO) Convention No 87 (referred to in article 22(3) of the ICCPR and article 8(3) of ICESCR). Australia is a party to ILO Convention No 87.

1.67 The right to freedom of association includes the right to organise and bargain collectively. The right of access to workplaces in order to consult with union members is a fundamental aspect of the right to freedom of association and to bargain collectively.[13] However, this right is to be exercised in a manner which does not prejudice the ordinary functioning of the enterprise or institution in question.

Employer's ability to limit period for negotiation.

1.68 The bill proposes to introduce a number of provisions that will regulate the process of bargaining in relation to greenfields agreements.[14] The bill provides for an employer to enter into negotiations with bargaining representatives in relation to a greenfield single enterprise agreement.[15] As the statement of compatibility notes, the proposed changes engage the right to organise and bargain collectively guaranteed by article 8 of the ICESCR and article 4 of ILO Convention No 98. The statement of compatibility states that the bill promotes the right 'by extending the good faith collective bargaining framework to the negotiation of all single-enterprise greenfields agreements'.[16]

---

13 International Labour Organisation, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th ed 2006), paras 1102-1111.

14 Greenfields agreements, are enterprise agreements made before any employees have been engaged at a new enterprise, and are often used in large-scale projects in the construction, administrative and support services, manufacturing and mining industries.

15 These include the employer (or appointed representative) and an employee organisation that is entitled to represent one or more of the employees who will be covered by the agreement and with which the employer agrees to bargain: see proposed new section 177.

16 Statement of compatibility , p lxiii.

1.69 The committee notes that the proposed amendments confer on only one of the parties to the negotiations (the employer) the right to set a limited period for negotiation and to take a proposed agreement to the FWC for approval if agreement has not been reached within the three-month period. It is not clear from the statement of compatibility whether the FWC has the power do to anything other than to approve the agreement proposed by the employer. This would be a limitation on the right to organise and bargain collectively.

1.70 The statement of compatibility does not provide sufficient detail to justify such a limitation. The statement of compatibility claims that 'to the extent that the proposed amendments limit rights, they are reasonable, necessary and proportionate to achieving the legitimate objectives of addressing and improving bargaining conduct for greenfields agreements and ensuring the timely negotiation of these agreements'.[17]

1.71 The committee accepts that the objective of seeking to avoid unnecessary and unreasonable delays in the negotiation of greenfields agreements is a legitimate objective. However, questions remain as to whether it is a rational, reasonable and proportionate measure of achieving this objective. In particular the committee notes that, when assessing the permissibility of limitations on rights, it has sought details of less restrictive alternatives that were available to pursue a legitimate objective and the reasons for preferring a more intrusive option; this goes to the evaluation of whether a measure is proportionate.

1.72 The committee notes that the Review Panel recommended options that would be less restrictive of the right to bargain collectively than the measures proposed in the bill. One, which is implemented by the bill, was the extension of the good faith bargaining obligation to negotiations relating to a greenfields agreement. The Review Panel also recommended that:

> After much thought and deliberation, the Panel is of the view that, where an impasse in negotiations is not resolved within a specified time and where conciliation by FWA has failed, FWA should have the power, either on its own motion or via a request from one of the parties, to resolve the impasse by a limited form of arbitration. While the Panel does not possess hard and fast views, FWA could be empowered to resolve the remaining outstanding issues between the parties by a process of arbitration, which is colloquially known as 'last offer' arbitration. In other words, FWA would examine the positions taken by the parties on the remaining outstanding issues and would be empowered to choose the position either of the employer or of the trade union or trade unions. It is the Panel's expectation that the ultimate availability of this type of final offer

---

17 Statement of compatibility , p lxiii.

> arbitration will ensure that the parties adopt realistic approaches to issues in their negotiations with one another.[18]

1.73 The committee notes that this option would still allow the FWC to approve an agreement and that this might take place in combination with a limited negotiation period, thus achieving the objective of avoiding unreasonable delay. The Review Panel recommendation would allow the positions advanced by both employers and unions could be considered by the FWC. No explanation is offered in the statement of compatibility as to why this recommendation of the Review Panel was not taken up.

1.74 The committee therefore requests the Minster for Employment's advice as to whether the proposed amendments relating to greenfields agreements are a reasonable and proportionate limitation on the right to bargain collectively.

Restrictions on union rights of entry to work places

1.75 The bill proposes new eligibility criteria that determine when a union official may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers. The amendments would impose additional conditions on the rights of entry for union officials.

1.76 The amendments will also require the FWC to issue an 'invitation certificate' to an organisation if the FWC is satisfied of certain conditions being met. The committee notes that the bill does not indicate what the effect of an invitation certificate is, and specifically whether an employer is required to grant entry to premises on the production of an invitation certificate.

1.77 The proposed amendments would restrict existing rights of entry to premises by unions, and may thereby restrict the right of individual workers to join a trade union. The statement of compatibility does not specifically provide a justification for the introduction of these restrictions. It states:

> These amendments place limits on the classes of persons who may exercise entry for discussion purposes, and in what circumstances. To the extent that these provisions limit the right to freedom of association, the limitation is necessary, reasonable and proportionate, because the amendments ensure that entry for discussion purposes can only be exercised if there are employees or TCF award workers on the premises who wish to participate in discussions, and the organisation has a legitimate role at the work site. The amendments ensure that the role of trade unions in Australian workplaces is enshrined appropriately in the

---

18 Review of the FW Act, pp 172-173.

> right of entry framework, and balances the needs of employers, occupiers and employees in a manner that is consistent with the object of Part 3-4.[19]

1.78 The committee notes that this statement does not provide a clear justification for the proposed restriction on rights guaranteed by article 8 of the ICESCR. The committee's usual expectation is that where a bill limits a human right, the statement of compatibility will set out how the limitation achieves a legitimate objective and is reasonable and necessary.

1.79 The committee therefore requests the Minister for Employment’s advice as to whether the measures are compatible with the right to bargain collectively and in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Repeal of requirements for employers to facilitate union visits to remote locations

1.80 The bill proposes to repeal provisions of the FWA that require an employer or occupier to facilitate transport and accommodation arrangements for union officials exercising entry rights at work sites in remote locations such as offshore work sites, mining sites and mining construction sites.

1.81 It appears to the committee that, in cases where transport or accommodation to a worksite is available only where the employer or occupier provides or arranges for its provision, a failure to require the employer or occupier to do so (if no agreement has been reached), would in effect make it impossible for union officials to visit worksites in order to undertake consultations or other authorised activities.

1.82 The statement of compatibility does not specifically provide a justification for the proposed repeal. It states only that:

> The repeal of these amendments does not limit the right to freedom of association. Rather, the amendments set out in the Bill merely relate to procedural matters of how a trade union may go about exercising its entry rights under the Fair Work Act, and the extent to which an occupier is required to facilitate the entry. They do not prevent or otherwise limit the exercise of existing entry rights.

---

19 Statement of compatibility , p lxiii.

1.83 In the committee’s view, the current provisions of the FWA relating to remote locations appear to ensure the right to freedom of association and to balance the interests of employees and employers by requiring the reimbursement of reasonable costs by union officials. While there may be some costs that are not recoverable by the employer or occupier, on the basis of the evidence provided in the RIS, these costs seem relatively small in the context of the overall budgets of the projects involved. Against this, removal of the obligation to arrange for transport to and accommodation in remote locations would appear likely to effectively nullify the right of union representatives to visit such locations to consult with union members and to undertake other activities, which is a fundamental aspect of the rights to freedom of association and to bargain collectively.

1.84 The committee therefore requests Minister for Employment's advice as to whether the proposed repeal of sections 521A to 521D of the FWA is compatible with the right to freedom of association and the right to bargain collectively.

Restrictions on the location of interviews and discussions

1.85 Currently, the FWA provides the union official is required to conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises. If the parties are unable to agree on a location, the union official is permitted to conduct the interview or hold the discussions in any room or area where the employees to be involved in interviews or discussion ordinarily take meal or other breaks.

1.86 The bill would restore the legislative position that existed prior to 2013 whereby the employer may, in the first instance, determine where the meeting is to be held provided this is reasonable. The amendments do not provide for an alternative location if the union official considers that the room allocated by the employer is unreasonable. However, the FWC has the power to deal with a dispute about whether it is reasonable. The bill would thus appear to make the exercise of the rights of trade unions to confer with its members and potential members (and vice versa) more difficult in practice, thereby limiting the right guaranteed by article 8 of the ICESCR.

1.87 The committee notes that the statement of compatibility does not specifically provide a justification for the introduction of these restrictions (See paragraph 1.35 above).

1.88 In relation to these provisions of the bill, the statement of compatibility does not provide a clear justification for the proposed restriction on rights guaranteed by article 8 of the ICESCR. The committee's usual expectation is that where a bill limits a human right, the statement of compatibility will set out how the limitation achieves a legitimate objective and is reasonable and necessary.

1.89 The committee requests the Minister for Employment's advice as to the compatibility of the proposed amendments to sections 494 and 492A, with the rights to collectively bargain, and in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Power of FWC to deal with disputes over frequency of entry

1.90 The FWC is empowered to deal with a dispute about the frequency with which union officials enter work sites. The FWC may make orders suspending, revoking or imposing conditions on an entry permit and various other orders. However, the FWC may only make an order 'if the FWC is satisfied that the frequency of entry by the permit holder or permit holders of the organisation [union officials] would require an unreasonable diversion of the occupier's critical resources.'

1.91 The bill proposes to amend the FWA to require the FWC, in dealing with such disputes, to take into account fairness between the parties concerned and the combined impact on the employer's (or the occupier of premises) operations of entries onto the premises by union officials.

1.92 It is not clear whether a consequence of the amendments might be that, because the FWC must take into account the combined impact of entries by all organisations (including those not party to the dispute), access by some unions may be limited if one union enters too frequently or if the overall impact of all entries is considered excessive from the point of view of the employer or occupier. This may apply even if the exercise of the right by each individual union might otherwise be reasonable. The committee considers that the amendments could limit access by unions to workplaces to a greater extent than is permitted under current law, and that this represents a limitation on rights guaranteed by article 8 of the ICESCR and ILO Convention No 87.

1.93 The statement of compatibility does not provide a detailed justification for the introduction of these restrictions. It states:

> The amendments also broaden the capacity of the FWC to deal with disputes about the frequency of entry to premises for discussion purposes. In dealing with right of entry disputes, FWC must take into account fairness between the parties concerned, and the combined impact of visits by permit holder's [sic] on the operations of the employer or occupier. These amendments ensure appropriate conduct by permit holders while exercising right of entry for discussion purposes, consistent with the right

> of entry framework established by the Fair Work Act, and provide for an avenue for the prompt resolution of disputes by an independent arbiter.
>
> The amendments in Part 8 of Schedule 1 to the Bill provide for right of entry disputes to be resolved with due respect for both the rights of employees to be represented at work and the rights of the occupiers of premises to maintain their property and manage their businesses. To the extent that the amendments limit the right to freedom of association, the limitations are necessary, reasonable and proportionate.[20]

1.94 The committee notes that this statement does not provide a clear justification for the proposed restriction on rights guaranteed by article 8 of the ICESCR. The committee's usual expectation is that where a bill limits a human right, the statement of compatibility to set out how the limitation achieves a legitimate objective and is reasonable and necessary.

1.95 The committee notes that there is some information about the frequency of entries and the costs to employers provided in the RIS accompanying the bill. However, this material is not applied to the analysis of whether the limitation of rights is permissible under human rights law.

1.96 The committee therefore requests the Minister for Employment's advice as to the compatibility of the measures with the rights to collectively bargain and, in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Restrictions on protected action ballot orders

1.97 Under the FWA employees may take protected industrial action in support of their claims for an enterprise agreement provided that certain conditions are satisfied.

1.98 The bill proposes the addition of a new requirement that bargaining representatives for employees must satisfy when applying for a FWC order that a protected action ballot be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement. The new

20 Statement of compatibility , p lxiii.

requirement is that an application for such an order may not be made 'unless there has been a notification time in relation to the proposed enterprise agreement.'[21]

1.99 The statement of compatibility states that the amendment 'is a direct response to and implements a recommendation by the Fair Work Review Panel that the FWA be amended so that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained (recommendation 31).'

1.100 The statement of compatibility accepts that the amendment limits the right to strike until bargaining has commenced, but concludes that the limitation:

> …is considered reasonable, necessary and proportionate to achieving the legitimate objectives of:
>
> • promoting the integrity of the collective bargaining framework, including by giving primacy to negotiations voluntarily entered into and conducted in good faith;
>
> • balancing the right to voluntary collective bargaining with the requirement to bargain where a majority of employees wish to do so; and
>
> • providing greater certainty as to the circumstances in which protected industrial action can be taken.

1.101 The committee notes that, while these may be legitimate objectives, the statement of compatibility does not explain clearly how the measure is rationally related to those objectives and whether the measures are a reasonable and proportionate means of achieving those goals (and why less restrictive alternatives such as retaining the present law would not be appropriate). Nor does it explain how these limitations are consistent with ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organize.

1.102 The committee therefore requests the Minister for Employment's advice as to the compatibility of the measure with the right to collectively bargain and in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

---

21 Statement of compatibility , p lxiii.