LABOR SENATORS' DISSENTING REPORT

Introduction

1.1 Labor Senators oppose the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (the Bill).

1.2 The Bill re-introduces measures of the former Fair Work Amendment Bill 2014, which were opposed by Labor and rejected by the Parliament on 11 November 2015.

Part 1: Annual Leave Loading

1.3 Part 1 of the Bill would amend the *Fair Work Act 2009* (the Act) to allow for annual leave loading to be paid on outstanding annual leave only if stated in the enterprise agreement or award.

1.4 Currently, s90(2) of the Act provides that an employee with a period of untaken paid annual leave is entitled to be paid the amount that would have been payable had the employee taken the period of leave, meaning that under the current arrangements an employee is entitled to be paid their base rate of pay plus, where an entitlement to leave loading and/or higher rate of pay exists, that leave loading and/or higher rate, on the whole of their accrued annual leave upon the termination of their employment.

1.5 The Fair Work Act Review Panel (the Panel) in Recommendation 6, said that '[A]nnual leave loading should not be payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect'.[1] The Explanatory Memorandum states that the aim of this particular amendment would 'provid[e] certainty for employers' as the current arrangement 'has meant additional costs to employers'. [2]

1.6 When in opposition the Coalition said it would implement Recommendation 6, adding that '[T]his will clarify circumstances where annual leave loading is payable on termination to address existing confusion and restore the conventionally accepted approach'.[3]

1.7 The terms of the Bill, as with the preceding, failed bill (Fair Work Amendment Bill 2014), overstep the area of leave loading and mean that full rate of pay matters like allowances and loadings will be excluded from the payment on termination.

1.8 The Australian Council of Trade Unions (ACTU) in their submission to the Committee point out that the impact of this provision will vary depending on the

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[1] Report of the Fair Work Act Review Panel, 'Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation', 2012, p 100.

[2] Explanatory Memorandum, p.viii.

[3] The Coalition's Policy to Improve the Fair Work Laws, May 2013, p. 36.

wording in modern awards and enterprise agreements.[4] This will therefore not provide the clarity the Government are assuming these changes will, and will only impact on the amount employees are entitled to receive at the termination of their employment, i.e. the amount they would have received should they have taken the actual leave.

1.9 The Australian Workers' Union (AWU) submit that this amendment would disadvantage a number of employees who may not have access to more beneficial provisions in an award or enterprise agreement:

> Employees frequently accrue substantial amounts of annual leave as they face significant opposition to taking their annual leave entitlements as time away from work, as employers often refuse employees leave at a time that would suit the employee if it does not suit the employer, and do not provide sufficient coverage for their position while on leave, meaning that the time surrounding a period of leave can be highly stressful for employees.[5]

1.10 This provision serves only to encourage employers not to grant periods of annual leave, as by paying out the annual leave without the associated loadings on termination rather than having to pay annual leave and its loadings during a period of leave is more monetarily beneficial to the employer. This results in employees' entitlements being stripped away both during employment and at the end of that employment.

Labor Senators' view

1.11 Labor Senators of the committee do not agree that removing the annual leave loading represents 'the conventionally accepted approach'. Employees should not be financially disadvantaged because they have not taken their full entitlement to paid annual leave at the time their employment ends.

1.12 Submissions to the committee outlined circumstances under which employees are discouraged from taking annual leave by the employer, resulting in annual leave being accrued over time through no fault of the employee. The committee was not presented with evidence that employees 'bank' annual leave to gain a lump sum at the end of their employment.

1.13 Employees should be entitled to the full rate of pay on annual leave that they would have been entitled to should the leave have been taken whilst employed.

Part 2: Taking or accruing leave while receiving workers' compensation

1.14 Labor Senators believe the introduction of a law prohibiting the taking or accruing of leave while receiving workers' compensation is unjust, unfair, and puts additional pressure on workers who are unable to work, usually by no fault of their own.

1.15 The ACTU in submission to the committee represented the circumstances as such:

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[4] Australian Council of Trade Unions, *Submission 4*.

[5] Australian Workers' Union, *Submission 5*, p.7

> To remove this entitlement, particularly given that an employee in receipt of workers' compensation has not chosen to be in such a position, is unjust. In most cases, while an employee receiving workers' compensation payments may not be paid by their employer, they are still engaged by their employer. They should not be left in a position where they are unable to work and are also suffering disadvantage because they are also denied the ability to accrue and take leave.[6]

1.16 At present, subsection 130(2) provides that an employee may take or accrue leave during a compensation period if taking or accruing leave is permitted by a Commonwealth, State or Territory compensation law.

1.17 Whilst submitters who support this measure believe it is an issue of clarification, such an amendment would remove the rights of the states and territories to govern workers' compensation and long service leave, and introduce a direct conflict of laws.

1.18 It should also be noted that this measure is of a reach even further than WorkChoices, which allowed annual leave to be taken and accrued unless the relevant workers' compensation law prohibited it, allowing workers in most jurisdictions, in practice, to take and accrue annual leave.

Part 3: Individual Flexibility Agreements

1.19 Labor Senators firstly note our objections to changes to Individual Flexibility Agreements reported during inquiry into the Fair Work Amendment Bill 2014. Our arguments regarding the trading off of benefits remain unchanged.

1.20 Part 3 of Schedule 1 to the Bill will extend the notice period for unilateral termination of an individual flexibility arrangement to 13 weeks, further restricting the genuine flexibility offered by an IFA, likely discouraging workers to enter into such arrangements. Labor Senators note that this is also likely to discourage employers from entering into agreements with employees, as should the flexibility be unworkable, the employee must be given more than three months' notice to change back to the status quo. This is an unreasonable situation for both employees and employers.

1.21 Under the Act as it stands currently, Individual Flexibility Agreements (IFAs) must reflect legitimate flexibility exercised in a way which is not detrimental to employees. This Bill would see those protections removed under the guise of 'giving employers and employees greater certainty about working arrangements'.[7]

1.22 The ACTU submit that:

> These amendments undermine a number of safeguards that were designed to address significant problems associated with Australian Workplace Agreements (AWAs) made under the Workplace Relations Act 1996 (WR Act) and which ensured that

[6] Australian Council of Trade Unions, *Submission 4*, p.8.

[7] Explanatory Memorandum, p. viii.

IFAs could not be used by employers to exploit vulnerable employees or drive down wages or conditions of employment.[8]

1.23 Additionally, the 'genuine needs statement' component still 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.

1.24 Labor Senators also note research presented by the ACTU, revealing that IFAs are being used in a manner that is expressly prohibited by the Act, with more than half admitting that they required all employees to sign IFA documentation to either commence or continue their employment, and that 27 per cent of multi-IFA employers did not assess whether the employee was better off overall.[9]

1.25 As whole, the amendments proposed in this bill not only represent an unacceptable resemblance to the long-opposed Australian Workplace Agreements (AWAs), but will certainly undermine existing protections for employees.

Part 4: Transfer of business

1.26 Part 4 of Schedule 1 would adopt the Panel's recommendation (recommendation 38) in relation to transfer of business to fix an unintended consequence where an employee wants to voluntarily change jobs, and proposes an exclusion for what constitutes a transfer of business, in relation to national system employers and in relation to the expanded operation with respect to State Public Sector employers.

1.27 In some cases it may be the case that an employee genuinely chooses to transfer their employment to a related entity of their current employer, but it is much more likely that an employee will have no choice but to move to an associated entity of their current employer.

1.28 The ACTU submitted evidence that few employees would choose 'no job' when their only other alternative was to keep their job on reduced conditions.[10]

1.29 Labor Senators argue that this amendment would further unbalance the employment relationship in favour of the employer, and that it is essential to ensure that the power imbalance does not work to further disadvantage employees.

Part 5: Right of Entry laws

1.30 Labor Senators firstly note our objections to changes to Right of Entry Laws reported during inquiry into the Fair Work Amendment Bill 2014. Our arguments regarding the ability of union officials to meet safely with workers remain unchanged.

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[8] Australian Council of Trade Unions, *Submission 4*, p. 9.

[9] Australian Council of Trade Unions, *Submission 4*, pp 15-16.

[10] Australian Council of Trade Unions, *Submission 4*, p. 25.

1.31 Labor Senators believe that all Australian workers have a right to union representation and unions should have fair access to work sites.

1.32 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.

1.33 Part 5 of schedule 1 provides new eligibility criteria that determine when a permit holder may enter premises for the purpose of holding discussions or conducting interviews with employees.

1.34 Currently, a union official can legally enter a workplace to hold discussions with employees who perform work on the premise, whose industrial interests the permit holder is entitled to represent and who wish to participate in those discussions.

1.35 The amendments in this Bill would result in a situation where unless the union is already covered by an enterprise agreement that applies to work performed on the premises, employees will be required to take positive steps to enable the union to attend a workplace. A union would need to obtain a certificate from the Fair Work Commission (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.

1.36 The amendments also relate to the frequency of which union representatives can enter the workplace (a matter already adequately managed within the Act), and further impact on the right to hold discussions with employees during meal times or other breaks (Subdivision B) and the right to conduct interviews at any time during working hours pursuant to a right to investigate a suspected contravention (Subdivision A and AA).

1.37 Further to this, the Bill further sways the Act in favour of employers, allowing lunch breaks to be staggered so that workers will not share a common lunch break, and allowing employers to direct the union official to meet with workers in a room next to the manager's office, so that the employer can observe who attends, and directing the official to meet with workers in a room that has insufficient space in order to limit the number of employees that can attend.

1.38 The NUW make particular note of the impact these laws will have on remote and regional Australians, as it limits their practical access to their union representatives.[11]

1.39 The ACTU also submitted evidence pertaining to the impact of such measures in smaller business, as while 'an invitation certificate must not reveal the identity of the member or prospective member to whom it relates, it is likely that employees will

[11] National Unions of Workers, *Submission 9*, p. 2.

be intimated by the prospect of having to go through a formal process in order to invite a union onto the workplace.'[12]

1.40 Labor Senators assert that these amendments will impact heavily on all vulnerable workers.

Part 6: Introduction of further administrative powers of the Fair Work Commission

1.41 Part 6 of the Bill would give the Fair Work Commission, the independent umpire, further administrative powers over its own hearings.

1.42 Currently the Commission is required by s 397 of the Act to hold either a conference or a hearing in an unfair dismissal matter where there is a factual dispute. Under the amendments, the Commission would be permitted to dismiss an application without holding a hearing or conference, provided that the Commission has invited the parties to provide information about whether the power should be exercised.

1.43 The independent nature of the Fair Work Commission is fundamental to the unfair dismissal system, and all parties should have the right to present their evidence prior to the dismissal of an application.

1.44 Labor Senators assert that this amendment exists only to benefit employers at the detriment of employees.

Conclusion

1.45 Labor Senators report that the Bill, like its predecessor, represents a race to the bottom on labour standards and is not meritorious for workers.

1.46 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

Labor Senators recommend that the Senate reject the Bill.

Senator Sue Lines
Deputy Chair, Legislation

[12] Australian Council of Trade Unions, *Submission 4*, p.28