Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

Submission to the Senate Education and Employment Legislation Committee

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INTRODUCTION

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill* ("the Bill") deals with three distinct matters. We deal with them separately in this submission. In short form our views are as follows:

- The first (dealt with in Schedule 1 of the Bill) relates to the abolition of the requirement to conduct reviews of modern award every four years. We support those provisions in principle, however we do not support the creation of a default requirement that all award variation matters be allocated to a Full Bench and we are concerned that the drafting of the transitional saving provision in relation to existing matters may have some unintended effects.
- The second (dealt with in Schedule 2 of the Bill) would provide for errors in the agreement making process to be forgiven in proceedings for the approval of an enterprise agreement. We are of the view that the provisions run counter to the objective that bargaining is inclusive, fair and well informed. We do not support the provisions.
- The third (dealt with in Schedule 3 of the Bill) amend the procedures for the investigation of alleged misconduct by Commission members and we do not oppose them.

ABOLITION OF FOUR YEARLY REVIEWS OF MODERN AWARDS

Schedule 1 of the Bill, and certain of the Transitional Provisions contained in Schedule 4, have the objective of relieving the Fair Work Commission from the requirement to review every modern award every 4 years.

Since the commencement of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008, the Award safety net has been in an almost perpetual cycle of review and refinement. This has cast a heavy burden on the Fair Work Commission and the representative organisations, including unions, that have participated in those processes.

To a large extent, the processes were unavoidable. The transition to a single national modern award system between 2008 and 2010, which reduced the number of awards from several thousand to one hundred and twenty two was a necessarily complex exercise and it was sensible, once the system had bedded down, to schedule a compulsory transitional review in 2012 to ensure that any unforeseen difficulties could be addressed. However, from the ACTU's perspective, the legislative requirement to review each award on a four yearly basis was incongruous when mechanisms already existed in the legislation for variations to modern awards to be initiated by persons covered by an award, their representatives or indeed on the Fair Work Commission's own motion.

The ACTU's experience of the 2014 award review - the first four yearly review - is that it has been exceedingly demanding on our resources and those of our affiliates. This is a view that is shared by employer associations. Each of the major peak councils urged the Productivity Commission, in the course of its inquiry into the Workplace Relations Framework, to abolish the four yearly review process. Further to those representations, the ACTU, Ai Group and ACCI wrote to the Minister late last year urging her to act on this consensus, and bring forward a Bill to achieve that objective. Indeed, we worked together to draft such a Bill and provided it to her.

Whilst the precise terms of the Bill agreed among the peak councils is not reflected in the Bill now before the Committee, it does with some exceptions reflect the consensus position reached and restore the position whereby changes in the award safety are a product of either a genuine contest on the merits within a concrete factual setting, or of the Fair Work Commission responding to demonstrable changes in community expectations and economic conditions (for example through the development of test case standards).

Whilst, for our own part, we would like to see more substantive revisions to the award safety net framework, including coverage to broader categories working people and explicit provisions to

ensure that the thing that is described as a safety net does not permit workers to fall backwards, we support the provisions save in relation to two matters.

Firstly, in departing from the consensus position reached, and from the Productivity Commission recommendation that relates to the matter, the Bill has been drafted so as to require each application to vary an award to be dealt with by a Full Bench by default, including quite minor matters such as resolving ambiguities and correcting errors. The reasons given in the explanatory memorandum for doing so are entirely unconvincing. Major award test have always been referred under the provisions of the day to a Full Bench, and the fact an award may have been made or reviewed by a Full Bench at some point in history provides no basis to assume that a Full Bench must deal with all matters relating to that award going forward.

Secondly, the terms of the transitional provision in Item 26(1) of Schedule 4 might be misconstrued as referring to only what the Fair Work Commission has described as the "award stage" of the Review. The "award stage" of the four yearly review relates to the review of single modern awards, whereas the "common issues" stage involves the review of multiple awards in relation to a particular issue (an example is the recent case seeking Domestic Violence leave in multiple awards). In common issues matters, the number and identify of awards that will be effected by a decision of the Fair Work Commission are not known until the conclusion of the proceeding (or shortly before). Multiple awards may be reviewed at the same time, and each award may be reviewed more than once for different purposes. We are concerned to ensure that Item 26 does apply to the breadth of such matters, and we therefore recommend it be re-drafted so as to apply to "reviews of one or more modern awards conducted as part of a 4 yearly review of modern awards":

(1) This clause applies in relation to reviews of one or modern awards conducted as part of a 4 yearly review of modern awards if:
   (a) proceedings for one or more reviews of a modern award commenced before the Schedule 1 commencement day; and
   (b) immediately before that day, those reviews had not been completed.

"PROCEDURAL" REQUIREMENTS RELATING TO ENTERPRISE BARGAINING

The provisions in Schedule 2 of the Bill sit uncomfortably with the general framework of pre-approval steps in bargaining. The existing provisions of the Act do contain a number of procedural requirements, but it is important to appreciate that the procedural requirements are not arbitrary but in fact serve a purpose. The policy goals of the bargaining framework include ensuring that process of bargaining is inclusive, fair and well informed. In serving those goals, the legislature had a choice: – to simply state that the process needed to be fair and leave the bargaining parties entirely to their own devices as to the process which should be followed; or, alternatively, provide a number of clear procedural rules so as to narrow the scope for discretionary decision making and misunderstanding. The latter course was adopted and the procedural rules that were developed were designed to deliver substantive fairness in the majority of cases. Simply put, they are safeguards which serve to promote the policy goals.

The amendments proposed would dilute the procedural framework by providing an exemption so as to allow the Fair Commission to forgive non-compliance with the following requirements in certain circumstances:

(a) The requirement on an employer to take reasonable steps to give employees who will be covered by an agreement a notice of representational rights no later than 14 days after the notification time for the agreement;
(b) The requirement on an employer to take reasonable steps to ensure that employees have (or have access to) the agreement and material incorporated by reference during the access period;
(c) The requirement on an employer to take reasonable steps to notify the relevant employees of the voting method and the time and place of the vote, by the start of the access period;
(d) The requirement on an employer to take all reasonable steps to ensure the terms of the agreement, and their effect, are explained to employees in an appropriate manner taking into account their needs and circumstances; and
(e) That requests to vote on an agreement not be made until least 21 days after the day on which the last notice of representation rights is given.

The Bill will permit such non-compliance to be forgiven where it is in the form of "minor and technical" errors, provided also that the employees as a group were not likely to have been disadvantaged by those errors.

The first difficulty with these provisions is that they invite the Commission to equate safeguards designed to ensure fairness in agreement making with mere arbitrary technicalities. Many of the

things that an employer is obliged to do, or take reasonable steps to achieve, by the provisions caught by the proposed exemption are fundamental to fair agreement making. For example:

- Employees ought to be given access to the agreement they are asked to vote on;
- Employees ought to have the true effect of those terms explained to them in a language they can understand;
- Employees ought to know what they need to do and when they needed to do it, in order to cast a valid vote for or against the making of the agreement.

Secondly, many of the requirements caught by the exemption are requirements that are not truly absolute, because they are not expressed as requirements that an employer must do something but rather are obligations that an employer *take reasonable steps* to do something. As such, whether or not the end result of the employer's efforts is strict compliance with particular procedural steps is in most instances not the true nature of the inquiry called for when the Commission is deciding whether or not it will approve an agreement. It is entirely unclear how an examination of whether particular steps were or were not reasonable could relevantly traverse "minor and technical errors" in the execution of those steps.

The "reasonable steps" qualifier applies to each of the provisions described at (a)-(e) above save for part of the requirement relating to the Notice of Representational Rights. The only aspect of the requirements in sections 173 and 174 of the Act relating to the Notice of Representational Rights that are not conditioned by a "reasonable steps" qualifier is the requirement in section 174(1A) for a Notice (where given) to contain the content prescribed by the regulations and no other content and be in the form prescribed by the regulations. The genesis of this provision, as recounted in *Peabody Moorvale*[1], is a recommendation of the *Fair Work Act Review* directed at ensuring the content of the statutory notice could not be modified. The *Review* received evidence that employers had been modifying the statutory notice and received complaints about the impact such modifications may have had on the course of bargaining. The Full Bench in *Peabody Moorvale* accordingly found that "the legislative purposes of s.174(1A) is to invalidate any Notice which modifies either the content or form of the Notice template provided in Schedule 2.1 of the Regulations"[2]. This suggest that the amendments proposed would not in fact lead to a different result than the one observed in that case, because non-compliance with the particular content requirements could not be described as either minor or technical.

Thirdly, the proposed amendment contains a merit test that focusses on the wrong issue. If a relevant "minor or technical error" is accepted to have occurred, the Commission can be satisfied that the agreement has been "genuinely agreed" if it is satisfied that the employees covered by

[1] [2014] FWCFB 2042
[2] At [47]

the agreement were not likely to have been disadvantaged by the errors. The Explanatory Memorandum clarifies that it is intended that the Commission need only be satisfied that the employees, *as a group*, were not likely to have been disadvantaged. This has the result that the impact, either real or likely, on individual employees is not the true focus of the inquiry. That being the case, a disadvantage in the bargaining process affecting a proportion of the group (for example those working night shift, those who speak a particular language or those who are union members), but not the whole of the group, is treated as insignificant. This detracts from the intended objective that all employees are permitted to participate in bargaining in an informed way and is in stark contrast to the requirement of the Better Off Overall test requirement that each employee be better of overall.

INQUIRIES AND COMPLAINTS RELATING TO FWC MEMBERS

The amendments proposed in Schedule 3 of the Bill would see Commission members subject to the provisions of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act* 2012. This will provide a more structured process for investigation of allegations of misconduct against Commission members, as well as investigative powers for doing so. This is the same process that applies to judges. Provisions in Schedule 3 also regularise the operation of existing complaint mechanisms in their application to members of the Commission who were appointed under different institutional arrangements. We do not regard the amendments as controversial.

ADDRESS

ACTU

365 Queen Street

Melbourne VIC 3000

PHONE

1300 486 466

WEB

actu.org.au

D No: 37/2017

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