Coalition Senators' Dissenting Report

1.1 Coalition Senators recognise the important role that private enterprise, particularly small business, plays in the Australian economy and strongly disagrees that Australian businesses are undertaking a campaign of "corporate avoidance" of the *Fair Work Act 2009* (Fair Work Act).

1.2 The Coalition understands that Australia needs a stable, reliable industrial relations system to keep businesses profitable, ultimately allowing them to employ more Australians, and keep our economy strong. The Coalition believes that corporate Australia overwhelmingly seeks to operate within the law, with there being significant legal sanctions and reputational risks to companies who seek to exploit workers or avoid their responsibilities.

1.3 Coalition Senators applaud the Turnbull Government's recent moves to strengthen the Fair Work Act to protect vulnerable workers being exploited by unscrupulous employers. This demonstrates the Coalition's commitment to ensuring that rogue businesses are held to account, whilst not punishing the overwhelming majority who do the right thing.

1.4 Unfortunately, it is clear that this inquiry has proceeded on the flawed and dishonest premise that the commercial decisions of employers to structure their operations in a way that best suits their needs within the constraints of the system amounts to "corporate avoidance" of the Fair Work Act. To that end, it is important to note the submission of the Department of Employment about this matter:

> "The *Fair Work Act 2009* (Fair Work Act) does not operate so as to restrict employers from structuring their operations as best suits their needs, including commercial decisions about the mix of full-time, part-time, casual, labour hire or independent contractors engaged by a business. This is subject to complying with their statutory requirements including redundancy entitlements and the transfer of business provisions.[1]

1.5 There has been no evidence provided to the inquiry to suggest that there is widespread avoidance of the Fair Work Act by companies. Instead, Labor Senators have appeared to rely on that oft-cited maxim of Dennis Denuto from the movie "The Castle" that "it's the vibe of the thing" as a basis to prosecute their attacks on private enterprise, particularly small business, and benefit their backers in the union movement.

1.6 Not only is the premise of this inquiry fundamentally flawed, it has been misused by a number of unions in an attempt to re-agitate industrial disputes where they did not get their way. This inquiry has been used to settle old scores—essentially by re-litigating the John Holland Federal Court case and punish certain organisations who have acted contrary to demands by the union movement. In this respect, Coalition

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1 Department of Employment, *Submission 149*, p. 4.

Senators consider it to have been an abuse of the Parliament to allow its forums to be exploited by vengeful unions for such a purpose.

1.7 This inquiry has also been used to push a policy agenda favoured by the union movement of giving the unions more power and placing new restrictions on organisations, such as labour hire companies and those involved in the 'gig' economy where unions find it difficult to recruit new members. If unions lack power in these areas it is not due to issues of "corporate avoidance" of industrial laws, and it is dishonest to attempt to make such a link.

1.8 The arguments advanced by unions and Labor Senators in this inquiry are not only misconceived but are also highly hypocritical given the evidence provided to the inquiry that many State branches of the Labor Party were identified as having signed agreements with small cohorts of employees at the time of the vote—a "corporate avoidance" according to the principles of the Labor Senators. By way of example, the ALP Queensland branch signed an agreement in 2013 with only five employees, and the ALP Tasmanian branch signed an enterprise agreement with just one employee in 2012.

1.9 Moreover, the approach of Labor Senators to this inquiry, in attempting to make unsubstantiated claims of corporate "avoidance" of the Fair Work Act, completely ignored the extent of deliberate avoidance and breaching of such laws by significant elements of the union movement.

1.10 Coalition Senators are of the view that it is utterly farcical for Labor Senators to have feigned indignation at imagined "avoidance" of laws by corporate Australia, when at the same time, the most senior members of their own union movement are openly advocating that unions should be able to break those very same laws.

1.11 The Secretary of the Australian Council of Trade Unions, Sally McManus, told the National Press Club earlier this year:

> "I believe in the rule of law where the law is fair, when the law is right…
> But when it's unjust, I don't think there's a problem with breaking it."

1.12 More recently, two senior leaders of the CFMEU in Victoria—John Setka and Shaun Reardon—are facing serious criminal charges of blackmail. Their legal representatives have sought to quash serious criminal charges of blackmail brought against them on the basis that criminal proceedings cannot apply to "industrial" behaviour. Remarkably, this situation was met with the response by Ms McManus that the criminal laws of this country should be amended so that they do not apply to criminal acts committed by union officials when they consider themselves to be acting in an "industrial capacity". In other words, union officials should be able to use their status to avoid with impunity criminal laws that apply to every other member of society.

1.13 This inquiry has occurred in the context of a serious crisis of avoidance of industrial laws within the union movement, most notoriously by Australia's wealthiest (and most corrupt) union, the CFMEU. The extent of this crisis has been made clear by numerous court judgements and judicial commentary on the CFMEU's deliberate policy of non-compliance with industrial (and other laws).

1.14 For example, the Federal Court in *Australian Building Construction Commissioner v Construction, Forestry, Mining and Energy Union and Ors* concluded that:

> The conduct of the CFMEU seen in this case brings the trade union movement into disrepute and cannot be tolerated.
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> In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. Such acceptance would pose a serious threat to the rule of law upon which our society is based. It would undermine the authority of Parliament and could lead to the public perception that the judiciary is involved in a process which is pointless, if not ridiculous.[2]

1.15 In a further case before the Federal Court, Justice Jessup found that:

> The CFMEU's record of non-compliance with legislation of this kind has now become notorious… That record ought to be an embarrassment to the trade union movement.
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> Quite obviously, over the years the CFMEU has shown a strong disinclination to modify its business model in order to comply with the law.[3]

1.16 Judge Jarrett stated in the Federal Circuit Court in 2016 that:

> The CFMEU has an egregious record of repeated and wilful contraventions of all manner of industrial laws.
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> The CFMEU…through its officers, employees and delegates, has a long and sorry history of industrial unlawfulness.
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> Choosing unlawful means to further its industrial objectives appeared to be the business model of the CFMEU.
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> The gravity of the offence is substantially increased by the prior history of the CFMEU and the moral culpability and propensity for unlawful conduct to achieve its own ends that it so clearly demonstrates. There is plainly a need to impose punishment to deter the CFMEU and others like it from treating this country's industrial laws as little more than an annoyance.[4]

1.17 In another case before the Federal Circuit Court in 2014, Judge Burnett stated:

> There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only

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2 [2017] FCAFC 53 per Dowsett and Rares JJ (at [99]-[100]).

3 Director, *Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 772.

4 Director, *Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCCA 1692.

> reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts.[5]

1.18 Rather than focus on this questionable commitment to the rule of law from their union allies, Labor seeks to punish businesses by suggesting "corporate avoidance" of the Fair Work Act, but without actually providing evidence to support their cause.

1.19 This inquiry has not uncovered "corporate avoidance" of the Fair Work Act and has struggled to demonstrate circumstances where companies have breached this Act, an Act which was wholly set up by the former Labor Government.

1.20 At the same time, this inquiry has uncovered questionable practices by sections of the Australian union movement, particularly the Shop, Distributive and Allied Employees' Association (SDA).

History

1.21 The *Fair Work Act 2009* was introduced by the then Rudd Labor Government in 2009, and it was touted as a centrepiece of that Government's legislative agenda of a new industrial relations system.

1.22 The then Minister for Workplace Relations, the Hon. Julia Gillard, spoke proudly of the objectives of the Fair Work Act in her second reading speech, which was made a year after the election of the Rudd Government in 2007:

> The bill aims to achieve productivity and fairness through enterprise-level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action.
>
> This bill seeks to assist employees to balance their work and family responsibilities by providing for flexible arrangements.[6]

1.23 Less than eight years after the introduction of the Fair Work Act, Labor Senators are now arguing that the legislation they created as their election centrepiece is seriously deficient, cannot be trusted to achieve its original objectives, and is being widely avoided by players in the industrial relations framework.

1.24 By Labor's own admission, they could not be trusted to create the industrial relations framework in this nation when in government but are now trying to argue that their recommendations should be adopted and changes made to the Fair Work Act.

1.25 This inquiry, and the recommendations of Labor Senators, included numerous examples of imagined "avoidance" that was actually compliance, together with examples of hypocrisy, selective analysis and double-standards. Two examples, in

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5 Director, *Fair Work Building Industry Inspectorate v Myles* [2014] FCCA 1429.

6 The Hon. Julia Gillard MP, *House of Representatives Hansard*, 25 November 2008, p. 11189.

relation to labour hire and penalty rates, illustrate the flawed approach that was adopted throughout the inquiry.

Labour hire companies

1.26 Coalition Senators recognise that labour hire companies have a role to play in the Australian economy, providing employment for thousands of Australian workers and valuable services to business.

1.27 The evidence provided by the Department of Employment made it clear that labour hire companies are subject to the same rules as other employees. This applied in reference to paying workers redundancy entitlements:

> Labour hire companies are subject to the same workplace relations requirements in relation to redundancy entitlements as other employers.
>
> The NES set out the minimum entitlements in relation to notice of termination and redundancy pay for permanent employees, including those employed by labour hire companies.[7]

1.28 The Department of Employment also noted that labour hire companies were not only subject to unfair dismissal provisions, but that the Fair Work Commission demonstrated a willingness to protect employees of labour hire companies:

> The unfair dismissal protections in the Fair Work Act apply to labour hire employees in the same way that they apply to more traditional employment relationships.
>
> While it will always depend on the particular factual circumstances, recent decisions of the Fair Work Commission demonstrate a general willingness to ensure that labour hire employees are afforded protection from unfair dismissal by a labour hire company.[8]

1.29 Further, the Department noted:

> As such, the use of labour hire arrangements does not constitute avoidance of the Fair Work Act provided these obligations are complied with.[9]

1.30 Labor has not demonstrated that labour hire companies seek to avoid their responsibilities under the Fair Work Act, nor has the case been made that there has been widespread attempts by labour hire companies to breach the Act.

Penalty rates

1.31 Disturbingly, this inquiry uncovered significant evidence about the role of certain unions in negotiating enterprise agreements which cut penalty rates and not appearing to represent the best interests of their members. The SDA was accused of a significant amount of wrongdoing.

1.32 Mr David Suter, a former Coles employee, told the inquiry:

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7 Department of Employment, *Submission 149*, p.10.

8 Department of Employment, *Submission 149*, p.11.

9 Department of Employment, *Submission 149*, p.4.

> At the meeting I attended, the assistant store manager was waiting at the door of the meeting room and watching who attended, and he was present throughout the meeting, although he popped out a few times. There was no objection to this from the SDA representative while I was present. At no time did any representative of Coles or the SDA advise us that our conditions were below those set out in the award. At no time did Coles or the SDA advise us that our take-home pay would be less than if we were on the award.[10]

1.33 The Retail and Fast Food Workers Union (RFFWU) noted about SDA negotiated agreements:

> In the retail and fast food sectors alone, approximately 500 000 workers are employed under SDA negotiated agreements at any one time. The estimated loss (compared to the minimum remuneration provided by the Award) to workers employed under these agreements is in excess of $300,000,000 each year.[11]

1.34 Coalition Senators are concerned about these reports, along with other reports in the media after this inquiry stopped taking submissions, which suggest that the SDA has represented their members poorly and believes the Education and Employment References Committee should further investigate these claims.

Conclusion

1.35 Coalition Senators believe that Australian businesses must follow the rule of law and strongly disagrees with the assertion by the Labor Party that there has been a campaign of "corporate avoidance" of the Fair Work Act.

1.36 Whilst it appears Labor Senators are concerned with some aspects of their Act created by the Rudd and Gillard Governments, it appears that Australian businesses are overwhelmingly complying with their responsibilities under this industrial relations framework, given the paucity of evidence of any actual breaches of the Act in the evidence considered.

1.37 Coalition Senators welcome recent moves by the Turnbull Government to make amendments to the Fair Work Act to address a number of specific issues where genuine problems have been identified. These changes included banning corrupting payments between employers and registered organisations representing employees, and protecting vulnerable workers from exploitation.

1.38 It is important that Australian employees and employers have the certainty of a strong industrial relations framework and that large scale changes are not made unnecessarily. Overall, the Committee's report has not demonstrated that there is a widespread problem of "corporate avoidance" of the Fair Work Act. Instead, the allegation of "avoidance" has been used as a dishonest vehicle to push union policy agendas that are in reality motivated more by a desire for greater union power to achieve their favoured outcomes in certain types of disputes. This inquiry would have

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10 Mr David Suter, *Proof Committee Hansard*, 18 May 2017, p. 23.

11 Retail and Fast Food Workers Union, *Submission 208*, point 5.

been more accurately entitled an inquiry into “corporate compliance with the Fair Work Act in various case studies of industrial disputes where particular unions did not get their way.”

1.39 Coalition Senators are concerned that this inquiry has been conducted in the context of an environment of deliberate avoidance of the Act by certain unions, which is apparently of no consequence or concern to Labor Senators or their union sponsors.

1.40 Coalition Senators reject the flawed and dishonest premise of this inquiry and reject the “findings” of Labor Senators, which have failed to reveal substantive issues of non-compliance and have instead relied on a “vibe of the thing” approach.

1.41 Coalition Senators reject the recommendations of the Chair’s report which are based on this false premise and flawed methodology.

Senator Linda Reynolds CSC
Deputy Chair