SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION (AWU)

FAIR WORK AMENDMENT (REMAINING 2014 MEASURES) BILL 2015

SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

21 DECEMBER 2015

The Coalition introduced the *Fair Work Amendment (Remaining 2014 Measures) Bill* 2015 (the Bill) on 3 December 2015. The Bill proposes a number of amendments to the *Fair Work Act 2009* (the Act), which were previously proposed and rejected by the Senate and the House of Representatives as part of the *Fair Work Amendment Bill 2014*.

The Australian Workers' Union (AWU) objects to the Bill in its entirety, as the proposed amendments seek to significantly undermine the entitlements of employees and the rights of unions to represent their members across the country. The AWU submits that these amendments are not required, are detrimental to the rights of workers and should again be rejected by both houses of Parliament.

RIGHT OF ENTRY

There is no empirical justification to amend the current right of entry regime in Australia. Appendix G of the Fair Work Commission 'Annual Report 2014-2015' contains data regarding the number of applications filed under various sections of the Act. Table G4 states out of a total of 32,047 applications filed in the 2014/2015 financial year, 69 applications were filed to deal with a right of entry dispute under s 505 of the Act.[1] This comprises 0.22% of the total number of applications dealt with by the Commission. If the current regime was problematic enough to warrant significant changes, one would expect to see a large amount of disputation. In this context, the only available conclusion is that the amendments to the current right of entry regime are ideologically motivated as opposed to being directed at addressing a current shortcoming with the Act.

The AWU is particularly opposed to the proposed amendments which seek to undermine the current right of entry regime, as they seek to seriously curtail the rights of unions and workers to interact on worksites. Right of entry by union officials to consult with members and potential members is a key tenet of ensuring that workplaces provide workers with appropriate freedom of association and rights to collectively bargain, as well as rights to representation and assistance with workplace issues. The AWU submits that the current right of entry provisions provide an appropriate balance between the rights of workers and the rights of employers, and should not be altered.

RECENT AMENDMENTS

The Coalition acknowledges that the proposed amendments dealing with location of meetings and transport and accommodation ('the right of entry sections') are designed to repeal and remove these sections of the Act which were introduced by the *Fair Work Amendment Act 2013*. The right of entry sections were introduced with a high level of consideration, evidence and public consultation. The Labor Government at the time in introducing the right of entry sections relied upon recommendations from the independent and broad-ranging report from the Fair Work Act Review Panel in 2012.

The right of entry sections were also referred to committees in the Senate and the House of Representatives, leading to multiple written and oral submissions by employers, employees and unions, and the subsequent reports and the sections themselves were the subject of significant debate and amendment within Parliament prior to being enacted. Therefore the right of entry sections were added to the Act after appropriate and significant parliamentary scrutiny and public consultation.

[1] See https://www.fwc.gov.au/documents/documents/annual_reports/fwc-ar-2015-web.pdf at page 187

The Coalition has not provided any evidence as to the effects of the right of entry sections since their introduction, or why they are proposing to remove them after less than two years of operation. To remove sections of the Act which were introduced based on independent reviews, and evidence from all sides of the employment relationship, without clear evidence of detriment would be highly counterproductive to the rights of employees, and undermine the general faith in the parliamentary system of checks and balances for legislation. The AWU submits that as these provisions were introduced with much thought and considerations, and have been particularly facilitative for collective bargaining and union representation on remote sites, they should be maintained.

INTERNATIONAL OBLIGATIONS

One of the principle objects of the Act is to provide workplace relations laws that take into account Australia's international labour obligations,[2] including the *Freedom of Association and Protection of the Right to Organise Convention* and the *International Covenant on Economic, Social and Cultural Rights* ("**ICESCR**"), to which Australia is a signatory. The ICESCR declares the following as a Human Right: [3]

Article 8(1)(c): "*The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others*".[4]

When the then Minister for Employment Relations Bill Shorten introduced the right of entry sections, he stated in the explanatory memorandum that "the amendments in Schedule 4 of the Bill advance freedom of association and 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. These changes to the right of entry framework do not limit the right to freedom of association."

The AWU stands by this statement, and rejects the assertion by the Coalition in the explanatory memorandum to the Bill that the limitations on the rights of trade unions and individuals which will result from removing the right of entry sections are reasonable, necessary or proportionate. The AWU does not believe that the changes to the right of entry sections comply with the international human rights obligations to which Australia is a party, and do not fall within the allowable exceptions contained in the ICESCR. The AWU submits that a number of the amendments proposed infringe upon this human right, as the amendments will have the effect of limiting the right of trade unions to recruit members, represent members and advocate for members, individually and collectively.

---

[2] *Fair Work Act 2009*, s. 3

[3] Recognised in *The Human Rights (Parliamentary Scrutiny) Act 2011*

[4] Article 8(1)(c) of the *International Covenant on Economic, Social and Cultural Rights* (New York, 16 December 1966), Entry into force generally: 3 January 1976, Entry into force for Australia: 10 March 1976

LOCATION OF MEETINGS

The current section 492 of the Act promotes discussion and agreement between the owner of the premises and the union about an appropriate place for meetings to occur in the workplace. This provision balances the rights and requirements of all parties, as it is important that work is not unduly disrupted for all employees, but equally important that those who wish to meet with unions are provided with a meeting area that is convenient and able to be accessed during break times to avoid attracting penalties for missed work time.

If agreement cannot be reached, however, the section provides additional protection for employees in allowing the lunchroom or place where workers ordinarily take a meal break as the default area for meetings. This is an important protection for workers and unions in situations where employers seek to impose unreasonable limitations on meeting places which make it impossible for workers to attend meetings without missing work time, as was described in evidence given to the Senate Committee in 2013 when this section was introduced:

The committee heard that in some workplaces inappropriate rooms are provided, at times to discourage employees from participating in discussions. The examples noted by the Review Panel included:

- An employer providing access to only one room across a site 3 km long, where employees have a 20-minute break;
- An employer providing access to half of a manager's office, divided by a partition, where the manager sits on the other side; and
- An employer providing access to a meeting room in an administration area that accommodates six employees where two lunchrooms are available, accommodating around 100 and around 30 employees respectively.[5]

The AWU is aware of many situations in which employers have sought to limit worker and union rights by the choice of meeting area, which is why the Act promotes discussion and an attempt to reach an agreement, but also allows for meetings to occur in the most accessible place for workers, the breakroom.

The Bill seeks to remove this right for employees to continue to meet with unions by removing any default area for meetings, putting the power in the hands of employers by requiring the union permit holder to comply with any 'reasonable request' to conduct interviews or discussions in a particular room or area of the premises. This removes the focus on agreement and discussion, as the default position is that the employer has proposed a 'reasonable' venue, and if the union does not agree, they must apply to the FWC to deal with the dispute and refer to the non-exhaustive list of what is 'unreasonable.' There is no provision for a meeting place in the interim, which means that while the dispute about location is being resolved in the FWC, the meetings are unlikely to be able to take place, which will have negative effects on situations of collective bargaining, individual employment disputes and/or industrial representation.

[5]The Senate, Education, Employment and Workplace Relations Legislation Committee, *Fair Work Amendment Bill 2013 [Provisions]*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2010-13/fairwork2013/report/c02 at 2.52.

The AWU submits that the current provision is far more facilitative and focused on a spirit of collaboration between the employer and the union, as agreement on an appropriate venue is encouraged by the section, while also providing for a neutral location to be used if agreement cannot be reached. As the Senate Committee noted in 2013, "the proposal to establish the meal room as the default meeting place when no other place can be agreed is sensible, and will promote negotiation between parties."[6] It is the AWU's submission that this provision has achieved its goal in promoting negotiation between parties as to an appropriate venue, and the default meeting room of the breakroom is rarely required to be used.

The AWU is concerned that the proposed provision in the Bill will be misused by employers to engage in hostile bargaining tactics in their choice of room for discussions in attempts to delay the discussions between unions and members and influence the negotiation of agreements, and therefore submits that this section should not be amended.

ACCOMMODATION AND TRANSPORT IN REMOTE AREAS

The AWU represents a large number of employees who work on worksites in large and remote areas, particularly in the metalliferous mining and hydrocarbons industries, that are geographically isolated, limited in the provision of transport and accommodation and often dangerous to access without appropriate safeguards. As employees are often required to work long and unsociable hours, and live and work onsite, it can be very difficult for union officials to access members and potential members in appropriate times and locations.

When the current provision at Chapter 3, Part 3-4, Division 7 of the Act was being considered in 2013, the Senate Committee heard evidence about the importance of in-person meetings and consultations for employees on remote sites, as alternative methods such as email, Skype and phone calls are often insufficient to create the appropriate level of trust and open discussion that facilitates effective union advocacy, representation and support, including in times of tragedy. Due to the remoteness of these locations, such as oil rigs or other inhospitable and inaccessible sites, it would be unsafe and costly for unions to access them without employer assistance around the worksite such as providing transport and accommodation. If these options are not available, the remoteness of the locations can be opportunistically utilised by employers as a way of blocking union access to members and other workers.

This division promotes agreement between officials and employers about accommodation and transport access to these sites, but allows officials to require an accommodation and/or transport arrangement to be provided if agreement cannot be reached, in order to allow officials access to such remote sites, with the union bearing the cost of the accommodation and transport themselves. There are a number of safeguards for employers in the section, in that the arrangement must not cause undue inconvenience to the employer, and the FWC can hear a dispute about the reasonableness and convenience of the arrangement, and the union must bear the cost of the arrangement being provided by the employer.

---

[6] The Senate, Education, Employment and Workplace Relations Legislation Committee, *Fair Work Amendment Bill 2013 [Provisions]*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2010-13/fairwork2013/report/c02 at 2.57.

Therefore it is a fair balancing of the rights of the employer and employee, in that access is provided, but the costs are borne by the union seeking the access. As the Senate Committee concluded at the time of considering these amendments, "the proposed changes to facilitate access by permit holders to remote sites are reasonable and in large part represent current arrangements between unions and employers."[7] The AWU submits that this section has been of assistance in facilitating such arrangements since its introduction.

If this provision is removed as proposed, officials will be at the mercy of employers who choose to drag out agreement about, or deny entirely, appropriate accommodation and transport arrangements in order to further their own aims. As employers are often the only providers of safe and appropriate transport and accommodation to these remote sites, this is a de facto way of allowing employers to deny right of entry to officials who otherwise qualify to enter sites and meet with employees for a number of reasons, including bargaining, support in times of distress, and representation and advocacy about employment issues. This will detrimentally affect the rights of workers in remote areas to access their union and officials in a private and timely fashion to get advice, advocacy and representation in relation to their employment. The current provisions should not be amended.

EMPLOYEE INVITATION

The Bill provides new eligibility criteria that determine when a permit holder may enter premises for the purpose of holding discussions or conducting interviews with employees. The new prerequisites for entry for discussion purposes are:

- Where an enterprise agreement applies to work performed on the premises, the permit holder's organisation must be covered by that agreement;
- Where an enterprise agreement applies to work performed on the premises, but it does not cover the permit holder's organisation, a member or prospective member will have to invite the union onto the premises; and
- Where no enterprise agreement applies to work performed on the premises, a member or prospective member will have to invite the union onto the premises.

The current provisions allow a union official to enter a workplace to hold discussions with employees if the union is entitled to represent the industrial interests of those employees and the employees wish to participate. The proposed changes would require employees and prospective members to contact the union and officially invite them onto the premises to participate in discussions in situations where the union is not party to a current enterprise agreement, or there is no enterprise agreement. This requires a sophisticated knowledge of the legislation and the eligibility and coverage rules of different unions, which vulnerable employees, who are most in need of union assistance, are unlikely to have. It also requires employees to go through a formal process of getting an invitation certificate from the Fair Work Commission if an employer challenges the right of a particular union to enter the site, which is likely to intimidate many employees, and also potentially negate the anonymity of the invitation certificate if it is a small workplace and it becomes obvious who has sought to meet with the union.

[7] The Senate, Education, Employment and Workplace Relations Legislation Committee, *Fair Work Amendment Bill 2013 [Provisions]*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2010-13/fairwork2013/report/c02 at 2.57.

On sites where no enterprise agreement exists, employees are already likely to be more vulnerable and less aware of their rights, therefore these provisions will serve to further disenfranchise them and discourage freedom of association and participation in collective bargaining. The AWU submits that these proposed changes are likely to be highly detrimental to workers accessing their rights to representation and union assistance, and should not be passed.

ANNUAL LEAVE

The proposed amendments reduce the scope for annual leave loading to be paid on accrued annual leave upon termination of employment. The Bill would mean an employee will not have this entitlement under the NES, so will be left relying on provisions in an award or enterprise agreement. The AWU is opposed to this provision, as it will seek to 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.

These and other factors mean that employees often have accrued annual leave when they end their employment, often through no fault of their own, while lack of sufficient time for rest and recreation has associated effects on mental and physical health of employees. All employees should be compensated for not taking that leave by being paid as if they were on that period of leave, which includes all relevant loadings such as annual leave loading. As was previously raised by the ACTU and others in the Senate hearings in relation to this section when proposed as part of the *Fair Work Amendment Bill 2014*, this provision is likely to encourage employers not to grant periods of annual leave, as they will be able to save money 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. Therefore the AWU opposes this amendment.

ACCRUING AND TAKING LEAVE ON WORKERS' COMPENSATION

The AWU also opposes the proposal to remove subsection 130(2), which allows an employee to take or accrue annual leave while absent from work and receiving workers' compensation if a compensation law allows it. The AWU submits that the removal of this provision is unnecessary, and as the provision only applies to employees who are covered under a compensation law that allows the taking and accruing of such leave, it has a limited reach and is unlikely to affect many employment situations, therefore removing it is unnecessarily harsh.

INDIVIDUAL FLEXIBILITY AGREEMENTS

The Bill proposes a number of changes to individual flexibility agreements (IFAs) in awards and enterprise agreements covered by the Act. The AWU opposes these changes as they seek to tip the balance of power towards the employer rather than the employee, and are not required. The AWU is particularly concerned that the insertion of a list of matters that may be dealt with by an IFA at proposed section 203(2)(aa) will encourage employers to propose IFAs on these matters as a template for all employees, rather than consider the individual requirements of each employee as is envisaged by the section. The AWU submits that it is not appropriate for the Act to specify a wish-list for employers to propose to employees in relation to IFAs or to enshrine in enterprise

agreements, particularly as these are the matters in which employees are likely to experience more pressure to negotiate away their superior conditions from awards or agreements that have been carefully considered by the Fair Work Commission. The AWU is also concerned about the proposal to insert a note stating that non-monetary entitlements may be taken into account in considering whether an employee is better off overall, as that is likely to encourage employers to propose non-monetary benefits to employees individually rather than provide them with appropriate rates of pay and allowances under the award or in negotiations for an agreement.

The AWU is also concerned that as employees are usually in a less powerful position when it comes to negotiating things like IFAs, the inclusion of terms such as a statement by the employee of why they are better off under the IFA, when there is already a term requiring that the flexibility term be genuinely agreed to by the employer and the employee, will serve to formalise employee disadvantage and detriment. Employees may not genuinely believe that they are better off, however they may be subject to undue pressure to sign such an IFA with these statements even if they do not sufficiently understand the consequences, and are then set up to lose any challenge they might seek to make by the provision that effectively absolves the employer from being found in contravention of a modern award flexibility term if they believed they were complying with the requirements.

The introduction of the timeframe for termination of 13 weeks is also a concern, as it seeks to standardise all modern award and enterprise agreement flexibility arrangements with a lengthy time of termination, which is likely to disadvantage employees in a number of industries. 13 weeks is a very long time if an employee decides that they do not want to be subject to the IFA, and the AWU submits that the Coalition should provide more evidence as to why the current provisions (of an agreed timeframe or 28 days) are not adequate. The AWU submits that the current flexibility terms in the Act are working effectively and should not be altered.

TRANSFER OF BUSINESS RULES

The AWU opposes the proposal to switch off the transfer of business rules if an employee “sought to become employed by the new employer at the employee’s initiative” prior to termination by the old employer. In a number of transfer of business situations, the employee seeks to be employed by the new employer so as to retain employment and accrued service and other entitlements in a timely manner, and employees should not therefore be disadvantaged in having their rights to continue their entitlements under their enterprise agreement or other transferable instrument removed by their use of initiative to maintain their employment. The AWU submits that the current transfer of business sections are working effectively and have no need of the proposed amendment.

Scott McDine
NATIONAL SECRETARY
THE AUSTRALIAN WORKERS’ UNION