The Maritime Union Of Australia National Office

Paddy Crumlin - National Secretary I **Mick Doleman** - Deputy National Secretary
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Ref: L/14/77

24 April 2014
Committee Secretary
Senate Education and Employment Committees
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Parliament House
Canberra ACT 2600
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Dear Committee Secretary,

Re Provisions of the Fair Work Amendment Bill 2014

Please find at **Attachment A** the Maritime Union of Australia's (MUA) submission to the Inquiry.

The MUA advises the Committee that it is does not support the proposed amendments to be applied to the Fair Work Act.

The MUA is a long standing Union with around 14000 members. As such we have a sound familiarity of industrial and employment relations as well as dealing directly with some of the world's largest multi-national corporations and small businesses.

This exposure has made us acutely aware of the negative effect of power imbalances that are further aggravated by proposed legislation including the *Fair Work Amendment Bill* 2014.

Accordingly, we urge the Committee to reject this Bill in its entirety.

Yours sincerely,

Paddy Crumlin
National Secretary

Attachment A

MUA response to the provisions of the Fair Work Amendment Bill 2014

Part 1 of Schdule1 – Extensions of Unpaid Parental Leave

Section 76 of the *Fair Work Act 2009* currently provides a right of for an employee to ask for an extension of the period of parental leave they are ordinarily entitled to, by up to twelve months. Currently, requests may be refused on "reasonable grounds" however the present provisions are lacking in that disputes relating to such matters are not able to be resolved by a third party in the absence of such a provision being expressly provided for in an enterprise agreement or other agreement providing for such resolution.

The Bill would alter the present position by preventing employers from refusing an employee's request unless the employer has first given the employee a reasonable opportunity to discuss the request, reflecting a recommendation of the Fair Work Act Review Panel ("the Panel").

The Union is of the opinion that the proposed process is required to be underscored by an effective right of review where the request is refused which has not been provided for in the Bill. The proposal does not go far enough in giving employees the ability to have an employer's unreasonable refusal challenged.

Part 2 of Schedule 1 - Annual Leave Loading

The decision of the government to attempt to repeal section 90(2) of the *Fair Work Act 2009* which requires employers to pay departing employees the same amount for unclaimed leave as would have been payable had the employee taken the period of leave during their employment is extremely inequitable.

The explanatory memorandum cites benefits to this modification include reducing unforeseen costs for employers and as a means of providing certainty to both employers and employees.

It seems however that the only beneficiaries of this policy will be employers. The inference that the current provision subjects employers to "unforeseen costs" is baseless. Employers would have had to pay annual leave loading if the employee were to have taken the period of leave during their employment therefore the costs cannot be regarded as "unforeseen". Likewise, employees who have fairly accrued leave are entitled to have it paid upon termination of employment at the same rate as it would have been paid at had they taken the leave during their employment.

It is the opinion of the MUA that the terms of the Bill may go beyond the area of leave loading and ultimately result in payments such as allowances and other loadings also being excluded. The impact of this provision will undoubtedly fluctuate depending on the phraseology used in awards and agreements which

will not be advantageous to either party.

Part 3 of Schedule 1 – Interaction between Leave and Worker's Compensation

Section 130 of the Act presently affords an extensive prohibition on employees taking or accruing any leave (other than unpaid parental leave) whilst in receipt of worker's compensation payments, subject to certain exceptions in circumstances where the law under which the compensation is paid authorises the taking or accruing of such leave whilst receiving such payments.

The Panel had advised that "*section 130 be amended to provide that employees to not accrue annual leave while absent from work and in receipt of workers compensation payments*". The coalition policy was to implement this recommendation, declaring that "*this will clarify the interaction between workers' compensation and annual leave pursuant to s.130*".

Neither the Panel nor the Coalition government put forward any sort of amendment in this area in relation to any kind of leave other than annual leave and the Panel recommendation did not go as far as to prohibit *taking* annual leave whilst on workers' compensation, only to *accruing* it. Additionally, the MUA is concerned this amendment will undoubtedly, adversely impact upon injured workers. Therefore the proposal is strongly opposed by the MUA.

Part 4 of Schedule 1 - Individual Flexibility Agreements

There is strong apprehension in relation to the proposals regarding Individual Flexibility Agreements (IFAs).

Division One refers to the creation of "genuine needs statements" in relation to IFAs. It appears that this will be intended to work in concert with the new defence provision in division two that will apply in relation to IFAs entered into in relation to Awards and Agreements.

Division Two provides for a defence for employers in relation to the contravention of an IFA. The defence provides that an employer will not have contravened an IFA if at the time the IFA was made, the employer was of the reasonable belief that the requirements of the flexibility term were fully complied with. Because IFAs will now contain a testament from the employee attesting to their needs being met and the better off overall test being met, it is probable that employers will come to rely upon that testament as a means of demonstrating their alleged reasonable belief for the purpose of satisfying the defence. A successful defence by an employer under the new provisions will result in no penalty, and no requirement to remedy any underpayment saving employers from any potential expense.

Division Three proposes that the flexibility term in Agreements cover (at a minimum) arrangements about when work is performed, overtime rates, penalty

rates, allowances and leave loading, allowing such benefits to be traded off for non-monetary benefits.
There is disparity between the pre-election commitment and the proposed action in that the “genuine needs statement” was never acknowledged in the Coalition policy and effectively operates to strengthen the employer’s defence to prosecution.

Whilst the defence had been previously acknowledged in the coalition policy by reference to a recommendation of the Panel, that recommendation stated clearly that the defence should only be available in circumstances where the employer had notified the Fair Work Ombudsman of the making of the IFA. There is no such provision in the Amendment Bill which serves to remove important employee protections.

Similarly, whilst the Union opposes non-monetary entitlements being used to offset the better off overall test, the safeguards that were included in the Panel recommendation that the Coalition identified it would implement have been removed.

It is noted that one of the recommendations of the Fair Work Panel was that if a monetary benefit is to be traded for a non-monetary benefit, then the value of the monetary benefit relinquished must be “relatively insignificant”, and the value of the non-monetary benefit be “proportionate”. What is notable however is the fact that the words “relatively insignificant” and “proportionate” appear have been omitted from the amended bill.

Part 5 of Schedule 1 - Greenfields Agreements

The amendments in relation to greenfields agreements provide, amongst other things, that good faith bargaining requirements will apply to single enterprise greenfields agreements and that an employer may unilaterally give notice of a “notified negotiation period” of the three months.

The consequences of these amendments are that at the end of the three month negotiation period, the employer can apply to the Commission for the approval of the agreement, without the agreement of any of the other bargaining representatives and the agreement will be considered to have been made with the organisations who were bargaining and it will cover and apply to them regardless of their opinions relating to the agreement.

The concern the MUA has over the proposal is that it appears to enable employers to effectively walk away from the negotiating table and simply wait until the 3 month negotiation period had lapsed before proceeding to have the agreement approved by the Fair Work Commission.

The assertion that this provision will enhance good-faith bargaining cannot be sustained. Whilst good faith bargaining may ensue for three months under this proposal, following that period, the employer is free to walk away and have the

agreement approved without any understanding having been reached.

Whilst the application of the good faith bargaining requirements and the three month period were raised in the coalition policy, it was never suggested that unions could be bound to agreements they did not make, nor was it suggested that the good faith bargaining requirements would cease to be applicable if no agreement was reached.

Part 6 of Schedule 1 – Transfer of Business

The Bill seeks an exclusion in relation to what constitutes a transfer of business in relation to both national system employers and in relation to the expanded operation with respect to State Public Sector Employers.

The exclusion would apply where both the new employer is a related body of the old employer when the employee becomes employed by the new employer. It would also be applicable where the employee sought to become employed by the new employer at the employee's initiative before the termination of the employee's employment with the old employer.

This amendment is open to abuse. An employer may reorganise their business with the solitary intention of evading their obligations under industrial instruments, and few employees would choose not to keep their job on reduced conditions where the only other alternative was unemployment.

Part 7 of Schedule 1 – Protected Action Ballot orders

There will no longer be a right to apply for a protected action ballot order unless and until one of the following has occurred:

(1)The employer agrees to bargain, or initiates bargaining, for the agreement; or
(2)A majority support determination in relation to the agreement comes into operation;
(3)A scope order in relation to the agreement comes into operation; or
(4)A low paid authorisation in relation to the agreement that specifies the employer comes into operation.

This effectively serves to further limit the ability of employees to engage in lawful industrial action and as a result the proposal is opposed by the MUA.

Part 8 of Schedule 1 - Right of Entry

The government's proposed narrowing of the circumstances when unions can enter workplaces for discussion purposes is of concern to the MUA.

The MUA is of the opinion that the proposals will work as a means of actively regulating employee's right to freedom of association. The claim made in the

Explanatory Memorandum is that this will be beneficial to employees as it will prevent disruption to their meal breaks is a theory which can be described as lacking at best. Employees with genuine concerns are likely to want their union to be available to have discussions with, to have such discussions on meal breaks makes sense as it prevents disruption to productivity.

The proposed dispute resolution provisions relating to regularity of entry removes the existing threshold question in section 505A(4) that precludes the Commission from making an order in respect of frequent entry unless the commission "*is satisfied that the frequency of entry by the permit holder or permit holders of the organisation would require an unreasonable diversion of the occupier's resources*". The amendments insert a new provision into section 505A that will oblige the Commission to consider the collective impact on "operations" of entries by any organisations. This includes those who are not involved in any dispute. This provision acts as a means of excluding all unions from a workplace in the event that one union has entered repeatedly which cannot be said to be beneficial to employees and is thus the proposal is not supported by the MUA.

The proposals to remove the current provision requiring employers to facilitate transport to and/or accommodation at remote sites where no other transport or accommodation is available is likely to prevent employees in remote workplaces from meeting or expressing concerns to their union. This will make it easier for some employers to evade being held to account for breaches to workplace health and safety legislation and for failing to adhere to relevant Enterprise Bargaining Agreements which cannot possibly be regarded as being a positive measure.

Part 9 of Schedule 1 – FWC Hearings and Conferences – Dismissing Applications

The Commission is at present, required by section 397 of the Act to hold either a conference or a hearing in unfair dismissal matters whereby there is factual dispute. The outcome of the proposed amendment to the legislation would be to establish an exception to section 397 regarding factual disputes over the basis for summary dismissal of an application. This means that if there is factual dispute about whether, for example, the application is made in accordance with the act, is frivolous or vexatious or has no reasonable prospect of success then the Commission can dismiss the application without holding a hearing or conference.

These amendments serve to benefit employers to the detriment of employee's. If an unrepresented applicant is incapable of accurately expressing in a written submission why their matter should not be dismissed, they will be extremely disadvantaged. It is the opinion of the MUA that such an amendment may inadvertently lead to a situation in which underprivileged people without legal resources may be pushed further to the margins out of the justice system entirely.

Part 10 of Schedule 1 – Unclaimed Money

The Act at present provides that certain debts owed to employees by their employers ought to be paid to the Commonwealth if the employee has left their employment and cannot be traced. The Act also provides that said monies may be claimed by the employee from the Commonwealth.

The amendment would facilitate, without actually requiring, the Commonwealth to pay interest to the employee accrued in relation to those funds when they are claimed. The MUA is of the opinion that the Amendment Bill ought to expressly provide for such a provision.

Any Related Matters

The union wishes to see the *Fair Work Act* to continue to function as an instrument to both regulate and strengthen the employer-employee relationship. The *Fair Work Act* has served a vital role in balancing what employees would like with what employers ought to provide. The difficulty the MUA has with the proposed amendments is that they look to be removing rights and protections employees have come to expect to receive in recent years in order to financially bolster employers without justification.

ENDS