Submission to the Senate Standing Committee on Education and Employment

Inquiry into the Fair Work Amendment (Remaining 2014 Measures) Bill 2015

`

December 2015

Australian Nursing & Midwifery Federation
PO Box 4239 Kingston ACT 2604
T: 02 6232 6533
F: 02 6232 6610
E: anmfcanberra@anmf.org.au
W: www.anmf.org.au

1. Summary

1.1 The measures proposed in the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 are unnecessary, punitive, have no logical or empirical justification and will only serve to further disadvantage working nurses and the rest of the workforce.

1.2 The measures proposed in the Fair Work Amendment (Remaining 2014 Measures) Bill 2015 if implemented will further exasperate and contribute to the inequitable gender pay gap.

1.3 Having been rejected by the Senate already the Bill should be withdrawn. The proposals do nothing to address gender inequity in workplace relations, they do nothing to address the more efficient and productive conduct of workplace relations and they do nothing to benefit employees or sensible employers.

2. Introduction

2.1 As submitted in previous enquiries The Australian Nursing and Midwifery Federation (ANMF) embraces the principle that labour regulation should protect and promote the nature and dignity of humanity and work. This means employees cannot be treated as commodities, nor can their labour be treated in purely economic terms.

2.2 Employees have the right to just minimum wages, fair and safe working conditions and the right of collective representation.

2.3 Employment and labour laws should reflect the values that are important to our society including the public interest, the fair go, institutional independence, due process and the transparent, recognition, application and regulatory support for collective representation.

3. The ANMF and nursing demographics

3.1 The Australian Nursing and Midwifery Federation (ANMF) is the national union for nurses, midwives and assistants in nursing with branches in each state and territory of Australia. The ANMF is also the largest professional nursing and midwifery organisation in Australia. The ANMF's core business is the industrial, professional and political representation of its members.

3.2 As members of the union, the ANMF represents over 240,000 registered nurses, midwives and assistants in nursing nationally. They are employed in a wide range of enterprises in urban, rural and remote locations, in the public, private and aged care sectors including nursing homes, hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, and off-shore territories and industries.

3.3 Nurses form the largest health profession, providing health care to people across their lifespan. They work independently or as collaborative members of a health care team in settings which include hospitals, rural and remote nursing posts, Indigenous communities, schools, prisons, residential aged care facilities, the armed forces, universities, TAFE colleges, mental health facilities, statutory authorities, general practices, businesses, professional organisations and people's homes.

3.4 Nurses provide professional and holistic care, working to promote good health, prevent illness, and provide care for the ill, disabled and dying. Nurses also work in non-clinical roles to educate undergraduate and newly graduated nurses, conduct research into nursing and health related issues and participate in developing health policy and systems of health care management. Nursing is a regulated profession. By law, before nurses may practice, they must be registered or enrolled by the Nursing and Midwifery Board of Australia (NMBA).

3.5.1 Overwhelmingly nursing is a female dominated occupation.

4. Specific comments on the Fair Work Amendment (Remaining 2014 Measures) Bill 2015

The *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (the Bill) is said to principally respond to a number of outstanding recommendations from the *Towards More Productive and Equitable Workplaces: an Evaluation of the Fair Work Legislation* (June 2012) (the Review).

In making the following comments the ANMF notes that many aspects of the Bill go beyond the Review recommendations.

The National Employment Standards (NES)

4.1 Payout of Annual Leave

4.1.1 The ANMF opposes the proposed changes to the NES regarding an employee's entitlement to be paid out their accrued annual leave entitlements.

4.1.2 Recommendation six from the Review stated:

> ***The Panel recommends that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.***

4.1.3 The proposal in the Bill goes further than the recommendation by providing that an employer can pay an employee annual leave on termination at a base rate of pay. The panel recommendation merely sought to remove ambiguity over the payout of annual leave loading on termination but also recognised that in many modern awards and enterprise agreements no such ambiguity existed as there were provisions in those industrial instruments for the payment to be made.

4.1.4 The proposed new sub section 90 (2) does not allow for such provisions, nor does it allow for other loadings and allowances that are currently included as part of the payments for annual leave owing on termination.

4.1.5 Subsequent to the Review the full court of the Federal Court has clarified the subsection. [See *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 100 where a full Federal Court confirmed that employers must pay out annual leave owed to workers on termination of employment at the same rate they would have received had they taken it while still working.

4.1.6 The proposed amendments in the Bill can only be viewed as a means of circumventing the Federal Court's decision.

4.1.7 The amendments will have a significant impact for nursing staff who rely heavily on payments in addition to the base rate of pay such as skill-based entitlements and allowances thus further eroding the earnings of female workers.

4.2 Leave accruals on workers compensation

4.2.1 The ANMF opposes the proposed changes to the NES regarding an employee's entitlement to accrue annual leave while absent from work and in receipt of workers compensation payments.

4.2.2 The Bill relies upon recommendation 2 of the Review:

> ***The Panel recommends that s. 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.***

4.2.3 With due respect to the authors of the review the discussion leading to recommendation 2 was deficient in that it did not address the disproportionate cost burden on employees and their families of workplace injury. Nor did the Review address the costs and process of recovery from workplace injury. To suggest that there is a cost burden on the employer in circumstances where an employee is able to accrue annual leave while on workers compensation cannot be substantiated.

4.2.4 In addition should the amendments proceed then substantial numbers of employees who currently have a benefit of accrued leave while on periods away from the workplace while on workers compensation as a consequence of subsection 130 (2) of the Act will lose that benefit. For example, Queensland workers covered by the Act accrue sick leave, annual leave and long service leave while receiving workers' compensation.

4.3 Individual Flexibility Agreements (IFAs)

4.3.1 In many settings where nursing work is carried there is significant reliance upon colleagues in a team to deliver effective nursing care. The sense of community cohesion and teamwork in reliance upon other members of the nursing team is vital to the delivery of care. A crucial underpinning of that cohesion is a sense of collectivism and consistency of wages and conditions. IFAs subvert this.

4.3.2 While it is recognised that IFAs were intended to provide certain individual flexibilities while maintaining protections for employees, it is crucial in nursing that arrangements for individual flexibilities do not place undue additional pressures on individual nurses or undermine the cohesion of the nursing team.

4.3.3 For these reasons the ANMF opposes the proposed changes to individual flexibility arrangements in both awards and enterprise agreements. Specifically the ANMF opposes those changes arising from recommendation 9 of the Review which stated:

> ***The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.***

4.3.4 Through submissions to the multiple enquiries that have been held on industrial relations legislation the ANMF has raised the gender-based inequity in remuneration for employees in the labour market. The fact of the significant discrepancy between male and female wages is well recognised and has been the subject of several reports.

4.3.5 Women workers in addition to receiving lower pay also are more likely to have gaps away from the workforce, work part time and have significantly greater responsibility for looking after children or caring for elderly parents. There is greater pressure on women workers therefore to seek more flexible arrangements in the organisation of their hours of work. In circumstances where women are already disadvantaged in relation to their rate of pay to suggest that remuneration can be further reduced to somehow compensate for alleged 'non-monetary benefits' which are inevitably driven by a disproportionate pressure on female workers to take on carer responsibilities is an extremely retrograde step. It should not be implemented.

4.3.6 The proposed amendments in giving implementation to recommendation 12 of the Review also seek to trap workers into a flexibility arrangement even where that is shown to be unsuitable, disadvantageous or prejudicial. Recommendation 12 stated:

> ***s. 144(4)(d) and s. 203(6) be amended to require a flexibility term to require an employer to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days.***

4.3.7 The proposed repeal of subsection 144 (4) (d) and its replacement with the 13 week notice period would have the effect of trapping workers in unfair and detrimental arrangements. Unilateral termination of an IFA should be available on 28 days' notice.

4.3.8 The level of controversy over individual employment arrangements make it abundantly obvious that, any assessment of an individual employment arrangement and its merits when compared with the collective employment arrangement that the individual arrangement seeks to deviate from, should be objective and transparent. Quite simply a 'reasonable belief by an employer' does not satisfy the standard.

4.3.9 These proposals rely upon Recommendation of the Review:

> ***The Panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.***

4.3.10 The ANMF is particularly concerned about the cumulative effect of the provisions proposed in relation to IFA's. Nursing is a 24-hour profession and substantive remuneration is received by nurses from shift penalties, allowances and overtime. Leave loading is designed in part to ensure that workers on annual leave are not dis advantaged as a result of ineligibility for allowances and loadings while they are on leave. The Bill proposes through the insertion of subsection 203 (2) (a) to provide a mechanism where in excess of 30% of nurses' wages could be discounted in the name of flexibility. The proposed amendment is opposed.

4.3.11 Finally, the proposals foreshadowed in subsection 144 (4) (ca) and subsection 203 (4A) seek to impose a totally meaningless requirement presumably to enable an employer to bolster the 'reasonable belief' defence also contemplated in the amendments.

4.4 Transfer of business

4.4.1 The effect and process of a transfer of business on employees is extremely complex and it is unrealistic to suggest that an employee request to transfer between associated entities can be viewed in isolation and thus treated as an out from the transfer business provisions within the Act.

4.4.2 The way the amendments are structured could result in employees who believe they are simply responding to an inquiry about whether they wanted to keep their job finding themselves without the current protections.

4.4.5 As the Review noted:

> ***The problem that s. 311(6) is designed to meet is ensuring that labour standards are not diminished when employees are transferred from one related corporation to another in a corporate group structure. Without this provision, it would be open to employers in a corporate group structure to transfer employees to associated entities where their terms and conditions of employment would be less favourable. Section 311(6) closes this loophole by ensuring that transferring employees who will be performing the same work carry their terms and conditions of employment with them.***

4.4.6 Any escape from the transfer of business provisions in circumstances where an employee moves from one associated entity to another at their only request should only be available whether wages and conditions in the associated entity that the employee has requested a transfer to our superior to those in which the transferring employee was previously employed.

4.4.7 This should also be the case in relation to the proposals for amendment to section 768 AD of the Act.

4.5 Right of Entry.

4.5.1 The Bill proposes a number of changes that reduce an employer's obligation to facilitate access to relevant and duly authorised union officials to members or potential members of that union.

4.5.2 As the ANMF has stated in previous submissions, the changes proposed in the Bill seek to override well-established principles of freedom of association for example as set out in ILO Convention 87 which provides that workplace representatives should enjoy such facilities as may be necessary for the proper exercise of their functions and including the right of access to workplaces.

4.5.3 The majority of unions and employers find that the current ROE arrangements work well and it is submitted that the law shouldn't change to meet the small number of exceptions. The problem the government faces is quite simply there is no evidence in support of these changes. They are clearly just an ideological craw and should not be pursued.

4.6 Unfair Dismissal Hearings

4.6.1 No case has been made out for the changes proposed in the Bill. The Act already provides that the Fair Work Commission can dismiss an application under certain conditions. The Bill appears to provide that the power to dismiss an application should be extended so that it can be exercised in the absence of a hearing. To do this would have the effect of diminishing the transparency of the Commission.

4.6.2 The ANMF supports a robust Commission subject to scrutiny. To allow applications to be processed in the absence of a hearing will result in a loss of rights for applicants. There is no proposal in the Bill for granting applications on the papers.