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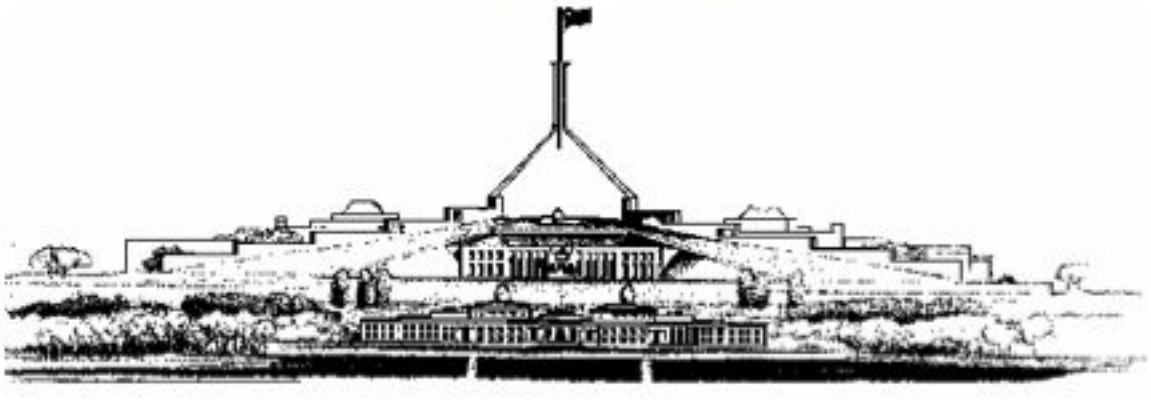

THE SENATE

BILLS

Fair Work Amendment Bill 2014

Second Reading

SPEECH

Wednesday, 16 September 2015

BY AUTHORITY OF THE SENATE

SPEECH

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Speaker	Xenophon, Sen Nick	**Question No.**	

Senator XENOPHON (South Australia) (11:48): I rise to speak on the Fair Work Amendment Bill 2014. While there are some measures in this bill I support and will be supporting in the second reading stages of the bill, there are other measures I simply cannot agree to.

It is worth looking at the history of workplace relations—a thumbnail sketch, if you like—to put this bill in context. Workplace relations have a long, turbulent history in Australia. Modern workplace relations began in 1904, when Australia established the Commonwealth Court of Conciliation and Arbitration. It was the first tribunal of its kind in the world, and it was tasked with resolving disputes between employers, employees and unions. Three years on, in 1907, the Commonwealth Court of Conciliation and Arbitration set the first minimum wage in the landmark Harvester case. On the ACTU website it mentions how the Harvester case set a minimum wage for unskilled labourers of two pounds, two shillings per week—the amount an average worker paid for food, shelter and clothing for him and his family. Notice that the case was all about a male worker, because the level of female participation in the workplace was much, much lower than it is today. That was based on supporting a family of five: the couple and three children.

For decades on the Commonwealth Court of Conciliation and Arbitration continued to make great strides in establishing and improving basic worker entitlements. As well as a minimum wage, a standard 38-hour working week was established in 1983, together with 10 days of sick leave and four weeks of annual leave per year. These are benefits that many of us take for granted now.

During World War II regulations came into effect that increased a woman's wage to 75 percent of a male's wage. The Commonwealth Court of Conciliation and Arbitration adopted these regulations and set a new standard in 1950. However, it was not until 1972 that the separate minimum wage for women was removed. By this time the Commonwealth Court of Conciliation and Arbitration had been decommissioned and re-established as the Conciliation and Arbitration Commission. The Commission established the right to equal pay for work of equal value. As a result of this decision, over half a million women became eligible for full pay, with women's wages increasing by approximately 30 per cent. An amendment to the Conciliation and Arbitration Act by the Whitlam government extended the adult minimum wage to include women workers for the first time from 2 May 1974.

I would like to pause for a moment to reflect on the issue of pay equality. Despite the passing of some 40 years since the Whitlam government's landmark legislation, the gender pay gap still persists. Using the latest data from the Australian Bureau of Statistics, the Workplace Gender Equality Agency calculates that the national gender pay gap is 17.9 per cent. In dollar terms, that is a difference of $284.20 per week. This 17.9 per cent pay gap figure is representative of the overall position of women in the workforce. It takes into account a number of complex and interrelated factors that contribute to the pay inequality experienced by women. Such factors include the differing rates of pay in male- versus female-dominated industries and the lack of women in senior positions. That is why I hope that both the government and the opposition will support my legislation on gender balance on government boards, which I think will go some way in dealing with those issues as part of that cultural shift.

One measure in the bill before the Senate today, the Fair Work Amendment Bill 2014, is a small but important step in empowering women in the workplace. It is the requirement for an employer to discuss an employee's request to extend their unpaid parental leave before dismissing such a request. I will discuss my support for this measure in more detail shortly but thought it timely to raise it now in the context of addressing the history of women's participation in the workforce.

I return to the evolution of workplace relations in Australia. The 1990s ushered in the era of enterprise bargaining, where employers and employees could approach the Australian Industrial Relations Commission to settle workplace disputes. A national workplace relations system was taking shape, but 2006 saw the introduction of then Prime Minister John Howard's infamous Work Choices. Ostensibly a measure to improve employment levels

and national economic performance, Work Choices did see the erosion of a number of basic employee rights. That was a case where the coalition had the numbers in the Senate, and I dare say that the course of political history in this country may well have been different if a so-called hostile Senate blocked that legislation. Sometimes the Senate can save a government from itself, whether it is a coalition government or a Labor government.

After its implementation in 2008, the Fair Work Act, introduced by the Rudd government, with then Deputy Prime Minister Gillard driving those changes, was subject to review in 2010. The Department of Education, Employment and Workplace Relations handed down its final report on the review in 2012. When drafting the Fair Work Amendment bill 2014, this government—and I say this respectfully—has actually cherry picked from a number of the 2012 review's recommendations. However, there are still measures in this bill I simply cannot support. Some of these measures will be removed by Senator Muir's amendment. I can well understand Senator Muir's caution with respect to some of the measures. I believe that some of the measures need further consideration and there needs to be a very cautious approach. I will return to the contentious measures in the bill a little later, but for now I turn to the provisions which I believe to be sensible and practical reforms.

Firstly, part 1 of the bill requires an employer to discuss any request from an employee to extend their unpaid parental leave before the employer can refuse such a request. I congratulate the government on this provision. It is something that I understand the Labor Party has long been an advocate for. It strengthens an employee's rights in relation to unpaid parental leave and it clarifies the obligations of employers to not dismiss such a request without due consideration. I think smart employers in this country should do everything they can to accommodate those requests for women in the workplace. In my very tiny legal practice, when staff have come back from maternity leave I have done everything I can to accommodate their working days and to have some flexibility in their working arrangements so that they can still participate in the workplace. That involves having flexible shifts or flexible days when they can work to accommodate their family circumstances. If you have a good employee, a valued employee, you do everything you can to nurture them and to keep them in your workplace.

The second measure I support is contained in part 3 of the bill. It relates to the accrual of annual leave while an employee is absent from work and in receipt of workers compensation payments. As a person who practised in the personal injuries field for many years and who still has a tiny legal practice in my name, this is a subject I have given serious thought to. I have seen the challenges injured workers and their families face. These challenges are often compounded by unclear, confusing and inconsistent laws relating to workers compensation and employees' entitlements. When the Liberal government in my home state of South Australia attempted to bring in what I thought were some quite draconian changes to workers compensation laws when I was president of the local branch of the Plaintiff Lawyers Association, they were resisted by the Labor opposition and by the Australian Democrats and were blocked because they were very unfair changes. The irony is that, a number of years later, even more draconian changes were brought in, which slashed workers' entitlements, and they were changes that were brought in by a Labor government. I see the irony in that. They were abetted by the opposition, who went along with those changes. Workers' rights in my home state have been significantly eroded.

The 2012 review recommended that the Fair Work Act be amended in order to remove such uncertainty to provide that employees cannot take or accrue annual leave while absent from work and in receipt of workers compensation payments. I think that, on the face of it, that is not unreasonable, but I understand the concerns that Senator Muir and others have that this may have a number of unintended consequences, and it needs to be looked at more carefully. For the purpose of this bill, that should not be dealt with at this time; I do not support those changes. But I do think we need to revisit that, because there may be unintended consequences, but the policy intent is not necessarily a bad one.

The third measure I support is contained in part 7 of the bill. This measure fixes the strike first, talk later loophole in the Fair Work Act. The 2012 review of fair work legislation recommended that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced. Part 7 implements this recommendation. It makes it clear that disagreement over the scope of a proposed enterprise agreement does not prevent the taking of protected industrial action. I believe this is a sensible reform that encourages disputes to be settled by way of conversation and negotiation rather than through industrial action. It has my full support. I think it was a loophole or an anomaly in the legislation introduced by the Rudd-Gillard government back in 2008. This is a sensible reform that is consistent with the recommendations made by the 2012 review triggered by the Gillard government.

The fourth measure for which I wish to express my support is contained in part 10 of the bill, which addresses the problem employers face when they cannot locate employees who are owed entitlements. If implemented, part 10 of the bill would allow the employer to pay these entitlements to the Fair Work Ombudsman. The employee is then able to claim their entitlements from the ombudsman. This creates a simplified process for employees to seek what is owed to them. Employers too will benefit, as their liability to their employee can be discharged and responsibility for management of these entitlements taken over by the Fair Work Ombudsman

This amendment also allows for the Fair Work Ombudsman to pay interest on the moneys owed to the employees, which is unambiguously a fair measure and is long overdue. Once again, it is a sensible measure and one that I am very comfortable in supporting.

The final measure I support relates to greenfields agreements and is contained in part 5 of the bill. However, my support is contingent on an amendment I will move that is co-sponsored by senators Day, Lazarus, Madigan, Muir and Wang. Part 5 of the bill extends the good-faith bargaining framework to the negotiation of single-enterprise greenfields agreements. Greenfields agreements are enterprise agreements that are reached between an employer and a union or unions before any employees have been engaged to work on a greenfields project. Currently the Fair Work Act does not require negotiations for greenfields agreements to be conducted in good faith. This is clearly a loophole. It is an anomaly and it was picked up in the review that was released in 2012. This is in contrast to negotiations of other agreements under the Fair Work Act, so I think the anomaly is quite clear there.

As a result of the absence of good-faith bargaining provisions, employer groups have raised concerns—I believe they are legitimate concerns—about delays of the commencement of projects when negotiations with unions stall, particularly where there are disputes about wages. This creates a high level of uncertainty around labour costs and exposure to industrial action, which can impede a business's ability to secure finance for a project. If they do not secure finance for the project, they cannot get the project going. If they do not get the project going, they cannot have employment. They cannot get a project started—and in some cases hundreds if not thousands of jobs are created in these greenfields projects.

Part 5 of the Fair Work Amendment Bill attempts to rectify this by extending the good-faith bargaining framework to the negotiation of greenfields agreements. This is consistent with recommendation 29 of the 2012 review of the Fair Work legislation. It is worth referring to page 173 of the then Australian government's *Towards more productive and equitable workplaces— an evaluation of the F air W ork legislation,* where it says:

While the Panel does not possess hard and fast views, FWA could be empowered to resolve the remaining outstanding issues between the parties by a process of arbitration, which is colloquially known as 'last offer' arbitration. In other words, FWA would examine the positions taken by the parties on the remaining outstanding issues and would be empowered to choose the position either of the employer or of the trade union or trade unions. It is the Panel's expectation that the ultimate availability of this type of final offer arbitration will ensure that the parties adopt realistic approaches to issues in their negotiations with one another.

To me, that final sentence is the key phrase here. And for it to be effective there needs to be a time frame. In order to provide more certainty and a more structured approach to the negotiation process, the 2012 review recommended that, when a specified time period has expired or conciliation has failed, Fair Work Australia can conduct a limited form of arbitration. The Fair Work Amendment Bill builds on this recommendation by inserting what a specified time period can be. In the case of the current bill, the government is proposing three months after the date when negotiation of the greenfields agreement started. The amendment I have co-sponsored with senators Day, Lazarus, Madigan, Muir and Wang changes this specified time period from three to six months. We believe that this provides more time and, importantly, more opportunity for both employers and unions to reach a consensus. I am very pleased that a number of my crossbench colleagues have been able to come together on this particular aspect of the bill, and I hope the government will support this amendment.

Now that I have discussed the positive, it is time to turn to the parts of the bill I cannot support. The proposed individual flexibility arrangements are one such measure. While I understand that being able to negotiate on when work is performed, penalty rates and allowances can provide employers and employees with greater flexibility, I am concerned that vulnerable employees could be disadvantaged by individual flexibility arrangements. I have been criticised by the union movement—who I think I have a pretty good relationship with on a whole range of issues—in relation to the issue of penalty rates. I do not want my position on penalty rates to be misunderstood or misinterpreted, as it has been, particularly in the heat of an election campaign. I think that there is a special case,

only for small businesses with 20 full-time equivalent employees or fewer and only in the hospitality and retail sectors, to look at a more flexible working arrangement where you do not have penalty rates of 175 or 200 per cent, which has been a job killer. My motivation for opening up this debate, for arguing the point and for putting up a bill which was quite friendless in this place was that young people, many of them university students, told me that when there was a spike in penalty rates they actually lost their jobs. While I am unlike those in this place who do not believe in minimum awards and in a strong, robust award system—which I absolutely believe in—I think we need to consider that workplaces have changed, that the pattern of people's shopping and leisure activities has changed and that Saturdays and Sundays are—

Senator Carol Brown: You have to go out and talk to some families.

Senator XENOPHON: Of course you do, and I think you need to have very strong safeguards. It is something I have discussed with the SDA—the shoppies union, to put it colloquially—who I think do an outstanding job in representing their workers. The issue is what you do to small businesses that shut down on weekends, particularly on Sundays, whose workers were quite happy to get 150 per cent of the award but that close down because it was ratcheted up to 175 or 200 per cent. Of course there is a fair process to be gone through through Fair Work in relation to this. But I am concerned about those, particularly university students, who have missed out on this. Senator Brown raised the point about families. If you are a full-time employee you should of course get your penalty rates. But I think we need to have a reasonable national conversation about casual employees and also make it very clear that once you get beyond the 20 full-time equivalent employees you should be big enough to look after yourself and be subject to enterprise bargaining agreements where there are appropriate safeguards in place. When I look at the figures for youth unemployment in my home state of South Australia, it does concern me. All I am suggesting is that there needs to be a sensible approach to this.

But I cannot support what the government wants to do with individual flexibility arrangements, because it does not have, as Senator Brown rightly pointed out, the safeguards that were recommended by the panel. It goes way beyond that. It does not allow for taking into account that it be specified in writing, that it be relatively insignificant and that the value of non-monetary benefits be proportionate. In the absence of those safeguards, I think we need to simply reject what the government is proposing in relation to that. Part 4 of this bill does not contain these safeguards. As a result, I cannot support this measure.

I also have concerns about the provisions in part 9 of this bill, namely the ability of the Fair Work Commission to dismiss an application for unfair dismissal without holding a hearing or conducting a conference. I think that needs further debate, further consideration. There ought to be sufficient safeguards for workers, and I do not think that the government has thought through those amendments carefully enough.

Overall, I think the measures that I have said I will support will enhance productivity and enhance employment, particularly on greenfield sites. These are important changes and I emphasise to the 33 people who may be listening on NewsRadio—maybe it is 34, and every time I say that I get abusive emails saying, 'I have been listening and how dare you dismiss the number of listeners'—that these changes are based on a review by the Gillard government into Fair Work and I think that the changes that I will be supporting and that a number of my crossbench colleagues will be supporting are fair and measured and reasonable and are based on what a previous Labor government review suggested. That is why I will support the second reading of this bill.