




# Provisions of the *Fair Work Amendment (Bargaining Processes) Bill 2014*

**22 January 2015**

**Submission to the Senate Education and Employment Legislation Committee**

AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group) supports the *Fair Work Amendment (Bargaining Processes) Bill 2014*. The Bill would make some modest but worthwhile changes to the bargaining provisions of the *Fair Work Act 2009* as discussed below.

The Bill, with the amendments proposed in this submission, should be passed without delay.

Our views on the specific amendments proposed in the Bill are set out in the following table.

| ***Provisions of the Bill*** | ***Position*** | ***Comments*** |
|---|---|---|
| **Schedule 1 – Amendments** | | |
| **Add new subsection 187(1A)**<br><br>Requirement that productivity improvements be discussed during bargaining<br><br>***(Item 1)*** | **Amendment proposed** | A requirement that productivity improvements be discussed during bargaining would be worthwhile to focus attention on the importance of improving productivity. Some unions have adopted the practice of refusing to discuss productivity improvements during the bargaining process viewing bargaining as a "one way street" where employees' entitlements are improved without any offsets.<br><br>Ai Group is concerned that, despite the amendment, some unions will simply refuse to meaningfully consider productivity improvements proposed by the employer. Accordingly, we propose that the word "genuinely" be inserted before "discussed" in s.187(1A). The word "genuinely" has been successfully used in the bargaining provisions of the national workplace relations statutes since at least 1996 in the context of the requirement to "genuinely try to reach an agreement" before industrial action is taken. The addition of the word "genuinely" in s.187(1A) would assist in ensuring that a bargaining representative does not refuse to meaningfully consider productivity improvements proposed by another bargaining representative. The addition of the word "genuinely" would of course not require that any concessions be made. |

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| **Subsection 443(1)**<br><br>Insert "only".<br><br>***(Item 2)*** | **Supported** | This is a necessary amendment given the drafting of s.443(2) in the Bill. |
| **Add new subsection 443(1A)**<br><br>Requirement for the Commission to have regard to all relevant circumstances when determining whether each applicant is genuinely trying to reach an agreement<br><br>***(Item 3)*** | **Supported** | This is a sensible amendment which aligns with the principles set out in *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 which is the key authority on the meaning of the term "genuinely trying to reach an agreement" in s.443(1)(b) of the Act. |
| **Delete existing subsection 443(2) and insert a new subsection 443(2)**<br><br>Claims must not be manifestly excessive or have a significant adverse impact on productivity<br><br>***(Item 4)*** | **Amendment proposed** | It is currently open to an employer to argue that an applicant is not "genuinely trying to reach an agreement" for the purposes of s.443(1)(b) because of the fanciful nature of the claims which it is pursuing, although such an argument is currently extremely hard to sustain because the legislation does not provide any guidance on the issue. Consequently few employers over the years have sought to pursue this argument.<br><br>Subsection 443(2) in the Bill would make a useful change to the bargaining laws although the use of the word "manifestly" would appear to set an extremely high bar. Ai Group proposes that the word "manifestly" be replaced with "clearly".<br><br>In addition, Ai Group proposes that the following new s.443(2A) be added to the Bill:<br><br>*"(2A) Despite subsection (1), the FWC must not make a protected action ballot order if a claim of an applicant:*<br><br>*(a) is not about a permitted matter or is not reasonably believed to* |

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| | | *only be about a permitted matter;*<br>*(b) is to include an unlawful term in the agreement; or*<br>*(c) is part of a course of conduct which is pattern bargaining.*<br>*Note: Industrial action is not protected industrial action in the above circumstances. See paragraph 409(1)(a), subsection 409(3) and subsection 409(4)."*<br>The above proposed additional paragraph is important to ensure that a protected action ballot order cannot be issued in circumstances where the claims of the applicant would result in the industrial action not being protected industrial action. It is not sensible, nor in the public interest, nor in the interests of the relevant employer and employees for a protected action ballot order to be issued in circumstances where the industrial action which the applicant is seeking to have authorised would not be protected industrial action because of the nature of the applicant's claims. |
| **Schedule 2 – Application and transitional provisions** | | |
| **Items 1 to 3** | **Supported** | We have not identified any problems with these provisions. |