

Australian Manufacturing Workers' Union's Submission
Senate Education and Employment Legislation Committee Inquiry
Fair Work Amendment (Bargaining Processes) Bill 2014

23 January 2015

About the Australian Manufacturing Workers' Union



The AMWU's purpose is to improve members' entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents around 100,000 members working across major sectors of the Australian economy, in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding tertiary qualifications.

Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following submissions to the Senate Education and Employment Legislation Committee inquiry into the *Fair Work Amendment (Bargaining Processes) Bill 2014* (the Bill).
2. The AMWU is an affiliate of the Australian Council of Trade Unions (ACTU) and supports the ACTU's submissions. These submissions supplement the ACTU's submissions.
3. The AMWU's submissions are based on a premise that economic growth is not an end in itself, but that improving people's welfare is the real measure of progress and the effectiveness of economic growth. Economic growth must lead to broad and inclusive economic development and improvements in people's standards of living.
4. The AMWU's submissions are also based on the community expectation that workers have a fundamental right to organise and make use of industrial action where necessary.
5. The AMWU's opposition to the Bill is based on the following reasons which are outlined in further detail in this submission:
 - a. The Bill doesn't facilitate genuine discussions about productivity, but instead is likely to result in uncertainty in bargaining and further litigation;
 - b. Genuine discussions about productivity would involve inclusive, open and honest discussions about matters including but not limited to: investment decisions, technology adoption, training and skills, processes and business strategy
 - c. The Right to Strike is fundamental to a worker's rights at work and is being restricted unfairly by the Bill in the context where the incidence of industrial action is at an all time low and wage growth has also been historically low;
 - d. The right to strike is fundamental to employees being able to exert effective influence over bargaining outcomes and to obtain a fairer share of the benefits of economic growth.
 - e. The Bill has misinterpreted a Fair Work Commission decision which is cited as a source for its drafting;
 - f. The Bill creates an incentive for employers to refuse to engage in discussions with employees about their wages and entitlements;
 - g. The basis for the Government's proposed changes is a myth of "Strike first talk later." Employees cannot strike first and talk later. Employees would only be able to take strike action before sitting down to talk to their employer under the current Fair Work Act if an employer has refused to engage in collective bargaining discussions requested by employees;
 - h. The bargaining process should be about coming to an understanding about what is agreeable between the parties and should allow for the parties to come to an agreement with minimal restrictions;

- i. The current Fair Work Act already places an obligation on employees seeking to take industrial action to be 'genuinely trying to reach agreement' and what this means is not in doubt.
6. The Government should focus on drivers of productivity improvements which can have broader impacts across the economy, by reversing its proposed budget cuts to programs which support industry wide skills, training and innovation.
7. The Bill is seeking to implement changes to the Fair Work Act before the Government has received the report of the Productivity Commission into the review of the Workplace Relations Framework.
8. For these reasons the Senate should reject the *Fair Work Amendment (Bargaining Processes)* Bill 2014.

The Requirement to Discuss Productivity

9. The Bill includes a new requirement that productivity improvements must be discussed during bargaining before the Fair Work Commission can approve the agreement.¹

"1 After subsection 187(1)

Insert:

Requirement that productivity improvements be discussed during bargaining

- (1A) If the agreement is not a greenfields agreement, the FWC must be satisfied that, during bargaining for the agreement, improvements to productivity at the workplace were discussed."

What is productivity?

10. The question of productivity in a particular business or the economy as a whole is much broader than just labour productivity and includes capital and multifactor productivity as well as labour productivity.
11. Recent Australian economic history has seen not only low levels of industrial disputes (as outlined by the ACTU) but also restrained wage growth with the wage price index growing a very modest 2.5% through the year to September 2014, lower than inflation over the same period and lower than any annual rate since at least 1998, at which time the relevant ABS catalogue² ceases.
12. At the same time, labour productivity has continued to grow, recording quality adjusted growth of 1.3% through the year to June 2014, while recording very strong growth of over 3% for the two preceding years.
13. However, the two types of productivity that are most determined by management investment and other strategic decisions (as opposed to labour agreements and workers themselves), namely capital and multifactor productivity, have both performed poorly over recent years.

¹ Item 1, Schedule 1, of the Bill

² Catalogue 5204.0 Australian System of National Accounts.

14. Capital productivity shrunk by 2% in the year to June 2014, after 12 years of falls of over 1% per year.
15. At the same time, multifactor productivity which measures how businesses are taking advantage of technology, fell by 0.1% in the year to June 2014, after a decade of poor results that failed to see growth of over 1% in a single year.
16. It is clear that as far as productivity is an issue for Australian business and the Australian economy, it is not labour productivity but capital and multifactor (technological) productivity that are underperforming.
17. Both of these types of productivity are the purview of management investment, process and technology adoption decisions and are largely not affected by enterprise bargaining outcomes or processes.
18. An honest discussion about productivity would focus on capital and multifactor productivity more than on labour productivity and would include the desirability for workers' input into decisions such as capital and technological investment decisions, training and organisational decisions as well as issues of business strategy.
19. A discussion that does not include these broader and more relevant productivity issues is not really one about productivity but is about bargaining away worker pay and conditions in an attempt to offset non labour productivity poor performance (which is more reflective of poor management rather than worker performance) or poor business performance due to broader economic factors more generally.
20. For example, the erosion of worker rights and conditions in response to the effects of a sustained increase in our exchange rate or sustained poor capital productivity performance is neither fair nor good policy as it both harms the wellbeing of workers and ignores the real sources of our economic challenges.
21. To base industrial relations or wages policy on changes in nominal factors such as exchange rates both misunderstands what real productivity is and what the role of policy in promoting productivity is, especially as the established Fair Work Act is operating as expected in the current economic situation; with more moderate wage outcomes, fewer days lost to industrial action and improving labour productivity.
22. An industrial relations policy that promotes both workers and business interests must focus on ways to increase the value and therefore productivity of Australian labour. Such a policy should ingrain improving the real drivers of productivity such as investment, technology, innovation, skills and training, as a regular part of doing business and it should do this collaboratively with workers, not in a combative adversarial context.
23. A policy that seeks to improve 'productivity' by lowering the value of labour cannot result in more valuable output, more skilled, motivated or productive workers or more prosperity more broadly.

What wrong with the Bill's requirement to discuss productivity?

The Bill's requirement does not promote a genuine discussions about productivity

24. The AMWU is always keen to have real discussions about productivity, or to support reforms that will make such real discussions possible.

25. However, the current Bill neither allows a genuine discussion of productivity as outlined above, nor does it provide an improvement to the bargaining process that will result in greater productivity.
26. It simply provides tactical advantage to business management in the bargaining process (additional advantage that neither the government nor any third party have been able to demonstrate is in the economy and nation's interest) at the expense of workers, which will result in poorer agreements for workers and poorer outcomes for their families and communities. All in a context of wage restraint and improving labour productivity.
27. The best way to promote real productivity improvements in the workplace is through open, honest and regular consultations between workers and management on all real aspects of productivity, including but not limited to; investment decisions, technology adoption, training and skills, processes and business strategy.
28. As in the German industrial relations system, such a goal can only be pursued collaboratively with workers and unions and would need to be based on greater mutually respectful engagement with management and preferably worker representation on business decision making bodies such as boards. Workers would need to be actively treated by management as partners in the business, not as a source for perpetual cost cutting as is currently the case.
29. Many reports and studies on skills have shown that the enhancing of workers' skills is one of the greatest contributions that can be made to improve productivity in the workplace (see, for instance, the various reports of the former Australian Workforce and Productivity Commission, which was abolished by the current Government in April last year). Yet if only crude measures of productivity or misunderstandings about 'productivity' are used, skills will not be improved nor productivity enhanced. By failing to facilitate such sophisticated discussions to take place, the bargaining requirement may in fact impede productivity improvements.

The requirement to discuss productivity is likely to result in uncertainty in bargaining and further litigation

30. In its survey of AMWU delegates in 2013, publicised in the AMWU publication "A Smarter Australia"³ union delegates stated that they were rarely if ever approached by their management to discuss matters which would enhance productivity. If this is the state of play of management understanding of the importance of productivity in manufacturing workplaces now, there will be significant difficulties with understanding the requirement proposed by the Bill.
31. Workers may demand, correctly, that they wish to upgrade their skills and that as such, that this will enhance productivity. If however the employer simply denies the validity of the argument regarding skills and simply demands crude improvements in what they claim to be 'productivity' such as working longer for the same or less pay, can the workers be accused of failing to bargain around productivity? Will the employer be equipped to understand that their claim is not in fact a productivity improvement?

³ "A Smarter Australia: What smarter firms, workplaces and partnerships mean to our future" Australian Manufacturing Workers' Union July 2013 accessible from http://www.amwu.org.au/content/upload/files/publications/FINAL_A_Smarter_Australia.pdf

32. This may result in a bonanza of litigation, as well as a further burden upon the FWC to inquire about productivity, whether it was correctly defined and understood by the parties, whether or not the discussion was itself productive or perfunctory, and whether any conclusions (productive or otherwise) were agreed.
33. In addition, it is not clear whether a bargaining representative can seek a bargaining order if an employer refused to discuss productivity. This potentially creates a mechanism by which an employer could obstruct the agreement making process.

What can be done to ensure there is a genuine requirement to discuss productivity that doesn't obstruct the bargaining process?

34. The Government could do more to promote real discussions about productivity improvements in the workplace that are in the form of open, honest and regular consultations between workers and management on all real aspects of productivity, including but not limited to; investment decisions, technology adoption, training and skills, processes and business strategy. Another step is for the Government to recognise that unions as the representative bodies for employees have a role in open and honest discussions about productivity in the workplace and support the involvement of unions in those discussions.
35. Further, if the Government wants to genuinely include productivity in discussions during bargaining, it could incorporate the requirement under the good faith bargaining requirements (instead of under the approval process as it has done here) so that any bargaining representative who declined to discuss productivity could then be the subject of a bargaining order from the Fair Work Commission. Conversely, any bargaining representative who felt that their proposals for productivity improvements were not being responded to could make an application to the Fair Work Commission for bargaining orders.

How else can the bargaining process be improved to target productivity?

Industry wide bargaining could unleash productivity beyond the workplace

36. There are more opportunities for improving productivity across the economy through industry wide bargaining and programs that have impact across the industry. As discussed above, productivity is affected by worker skills, effort, technology, adequacy of processes, management skills and motivation.
37. Industry wide skills improvement programs tailored to target the skills needs of an entire industry can also directly impact upon the productivity of businesses. Similarly, improved development and adoption of technology and processes across entire industries can also improve productivity.
38. Industry wide productivity enhancing terms which are targeted at assisting skills or technology improvements could be included in modern industry or occupational awards. Providing for productivity increasing requirements to be included in modern awards would allow the benefits to be realised on an industry wide basis. For example mandating union consultative committees in all workplaces through modern awards could unlock the potential for productivity improvements through workplace cooperation across entire industries.

What else can the Government do to improve productivity?

39. Investments which the Government can make in skills, training, science and innovation should lead to increased productivity and therefore increased competitiveness for Australian businesses. Improved competitiveness of Australian businesses should lead to increased sales and turnover of products, which in turn leads to increased profit and income for workers. These outcomes should also lead to improved budget revenue for the Government, providing a return for the Government for investments that it makes in skills, training, science and innovation.
40. The Government announced a range of budget cuts to programs targeting skills, training, science and innovation which could be reversed to not only improve productivity but also improve the budget's position over the long term. This would also accord with the broad community expectation that Government's should be ensuring budget solvency, not a blind aim of budget surpluses.

Changes proposed by the bill relating to Protected Industrial Action

The Right to Strike

41. The changes to protected action ballot orders proposed by the bill are opposed by the AMWU because they will hinder an employee's right to strike.
42. An employee's right to organise in their workplace is fundamental to their workplace rights. Being able to partake in industrial action is fundamental to the right to organise. Without the right to organise and bargain collectively with work colleagues, employees in manufacturing would not be as effective in bargaining for improvements in their wages and conditions.
43. Being able to effectively bargain and obtain a fair share of the business profit is critical to ensuring that economic growth does not just benefit the few, but has its benefits shared more broadly.
44. The right to strike ensures that workers can access an effective means of applying pressure on employers to genuinely come to the bargaining table. Without the right to strike and no requirement that employers come to agreement, or for an independent umpire to make an order about terms and conditions of employment, an employer could withhold agreement to increases in terms and conditions of employment indefinitely without engaging in any discussions.
45. The right to strike equalises the position of the employer and employees so that they can bargain as equals with approximately equal bargaining power.⁴ Without an ability to bargain as an equal with an employer, employees will not be able to effectively seek and obtain their fair share of the growth of the business, which they have played a critical role in supporting.

⁴ The ACTU's submissions to this inquiry 23 January 2015 notes correctly that the present Fair Work Act already curtails employees' right to strike significantly and therefore altering the balance of bargaining power between employees and employers.

Proposition about what must be taken into account by the FWC when determining whether a party is “genuinely trying to reach agreement”

46. The bill attempts to outline a list of what the Fair Work Commission must have regard to when determining whether a party is “genuinely trying to reach agreement” for the purposes of an application for a protected action ballot.⁵

“3 After subsection 443(1)

Insert:

- (1A) For the purposes of paragraph (1)(b), the FWC must have regard to all relevant circumstances, including the following matters:
- (a) the steps taken by each applicant to try to reach an agreement;
 - (b) the extent to which each applicant has communicated its claims in relation to the agreement;
 - (c) whether each applicant has provided a considered response to proposals made by the employer;
 - (d) the extent to which bargaining for the agreement has progressed.”⁶

What’s wrong with listing the proposed matters which the FWC must have regard to?

The source of the list has been misinterpreted

47. The Explanatory Memorandum notes that the list of matters are taken from a decision of a Full Bench the Fair Work Commission *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368.⁷
48. The decision has been misinterpreted and cherry picked from by the Bill’s drafters. The exact paragraph from the decision which was not replicated in the Explanatory Memorandum is as follows:

“[32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted.”
(emphasis added)

49. The Full Bench clearly notes that it is not possible to establish rigid rules.
50. The Full Bench also notes that the assessment may “frequently” involve considering the factors it lists, but not always each factor. The factors that the Bench listed were clearly applicable to the facts of the particular case before it.

⁵ Item 3, Schedule 1 of the Bill.

⁶ Item 3, Schedule 1 of the Bill

⁷ Explanatory Memorandum, page 3, paragraph 14.

51. With respect to the requirement that regard must be had to “*the extent of progress of negotiations*”, this statement was made in the context where negotiations had already commenced and the employer was at the bargaining table and had agreed to bargain. This has been adapted into the bill as “the extent to which bargaining for the agreement has progressed.”
52. It is unclear if the requirement was included in the Act what level of progress would support a finding that the bargaining representative was “genuinely trying to reach agreement.” The matters which are listed in the bill appear to create obligations or requirements on the bargaining representatives to discharge, rather than be an indicative list of matters which may come to bear on the decision. This will further create uncertainty for employers and bargaining representatives about what their obligations should be.

Creating a further incentive for employers to refuse to bargain

53. Placing the requirement in the Act that regard must be had to the “extent to which bargaining for the agreement has progressed” may create an incentive for an employer to refuse to bargain and refuse to respond to employees’ claims. If an employer refuses to bargain, then it would be impossible for an employee bargaining representative or a union to show that negotiations had progressed.
54. It is also unclear how the applicant is to address “whether each applicant has provided a considered response to proposals made by the employer.” This may also create an incentive for the employer to refuse to bargain.

Isn’t this required to support the changes in the Fair Work Amendment Bill 2014, to end the circumstance where unions strike first talk later?

Strike first talk later only occurs at the employer’s initiative

55. The Government’s claim that the Fair Work Act allows “strike first talk later” is only true because an employer can refuse to talk, not because employees or their bargaining representatives have refused to talk.
56. It is during these circumstances, that employees and the union have been forced to seek protected action to put pressure on employers to come to the bargaining table and begin bargaining.
57. If an employer has not received any correspondence or request for a meeting to commence bargaining, *it would be impossible for a protected action ballot to be ordered under the current Fair Work Act.* There are no instances of the Fair Work Commission ordering a protected action ballot where a union has had no contact or has not attempted to seek a meeting to commence bargaining with an employer.
58. It would also be extremely unlikely that any employees would vote in the protected action ballot to take industrial action, if one were granted in the circumstance where the Union bargaining representative had not requested a meeting with the employer.
59. The current Fair Work Act already provides that Union bargaining representatives cannot successfully seek a Protected Action Ballot where they have not been “genuinely

trying to reach agreement.”⁸ Further, where an employer believes that a Union bargaining representative is not “genuinely trying to reach agreement” they can provide this evidence to the Fair Work Commission proceedings about whether or not to grant a Protected Action Ballot.

The Requirement that claims made during bargaining are not “manifestly excessive” or have “significant adverse impact on productivity” before a protected action ballot can be ordered

60. The Bill includes a requirement that the Fair Work Commission cannot make an order for a protected action ballot if the claims being made by those seeking to take industrial action are “manifestly excessive” or “would have a significant adverse impact on productivity.”

“4 Subsection 443(2)

Repeal the subsection, substitute:

- (2) Despite subsection (1), the FWC must not make a protected action ballot order in relation to a proposed enterprise agreement if it is satisfied that a claim of an applicant or, when taken as a whole, the claims of an applicant:
- (a) are manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates; or
 - (b) would have a significant adverse impact on productivity at the workplace.”⁹
61. Under the current Fair Work Act, a protected action ballot order allows a bargaining representative to have a secret ballot conducted (either by the Australian Electoral Commission or other FWC appointed Ballot Agent) of employees who the bargaining representative represents, about whether or not they wish to take industrial action.

What’s wrong with stopping “manifestly excessive” claims?

The bargaining process should be about coming to an understanding about what is agreeable between the parties

62. What may be considered manifestly excessive as a final outcome could be considered a reasonable outcome early in the bargaining process by one party, particularly where an employer has refused to engage in discussions and to provide their perspective about why they do not support certain claims. Conversely, what may be manifestly excessive from an employee’s perspective may seem reasonable to an employer before they have had the opportunity to hear from union representatives about why certain entitlements are important to employees.
63. Forcing employees to only make claims that they might consider not to be “manifestly excessive”, where an employer is refusing to bargain means that they must estimate what is not “manifestly excessive” before they have had the opportunity to commence bargaining and hear from the employer the employer’s reasons for why particular claims are not accepted or even excessive.

⁸ s.443(1)(b) of the Fair Work Act 2009.

⁹ Item 4, Schedule 1 of the Bill.

64. The framework for bargaining should revolve around supporting parties to come to the bargaining table and arrive at agreement through good faith bargaining. It should not seek to force parties to make concessions about imagined arguments against their claims or otherwise before they have had the opportunity to hear the other side. The current Fair Work Act already ensures that parties are not forced to come to agreement.

Making employees reduce their claims where employers are refusing to bargain incentivises employers abstaining from bargaining

65. Forcing employees to make their own guess as to what their employer may concede to without hearing from the employer is forcing employees to make concessions even before bargaining has started and creates a further incentive for employers to refuse to commence bargaining in order to force down the claims of employees.

No one is currently being forced to agree to agree to anything

66. The Bill's restrictions on the bargaining tactics of bargaining representatives is one sided and doesn't acknowledge that the Fair Work Act currently already maintains an employer's right not to agree to anything and also to engage in response industrial action.

There are consequences for taking strike action

67. The Bill also does not acknowledge that an employee's decision to take industrial action is taken with the full understanding that currently under the Fair Work Act they cannot be paid for the time that they go out on strike.

Even if a protected action ballot is ordered, employee industrial action cannot be taken unless the union continues to be "genuinely trying to reach agreement"

68. The current requirements are that industrial action is not protected unless the party taking industrial action is "genuinely trying to reach agreement."¹⁰ The Fair Work Commission can make an order that industrial action stop if it is not satisfying the common requirements for protected industrial action, which includes the requirement to be "genuinely trying to reach agreement."

Conclusion

69. For the reasons outlined above, the Senate should reject the Bill.

End

¹⁰ s.413(3) of the Fair Work Act 2009